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No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE AMERICAN SHEET & TIN PLATE COMPANY ET AL., APPELLEES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH, 1937

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 530) is reported in *American Sheet & Tin Plate Co.* v. *United States, and five other cases* (consolidated for hearing), 15 F. Supp. 711.

The general report of the Commission (R. 10), announcing certain governing principles, is reported in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues Or Expenses, Part II, Terminal Services,* 209 I. C. C. 11. The supplemental reports, in connection with which were entered the orders involved in the consolidated cases, are reported in *American Sheet and Tin Plate Company Terminal Allowance,* 209 I. C. C. 719 (R. 49); *Allegheny Steel Company Terminal Allowance,* 209 I. C. C. 273 (R. 66); *Pittsburgh Plate Glass Company Terminal Allowance,* 209 I. C. C. 467 (R. 83); *Weirton Steel Company Terminal Allowance,* 209 I. C. C. 445 (R. 100); *West Leechburg Steel Company Allowance,* 210 I. C. C. 213 (R. 116); *Pittsburgh Plate Glass Company Terminal Allowance,* 210 I. C. C. 527 (R. 129).

JURISDICTION

The final decrees of the District Court were entered July 29, 1936 (R. 554–558). Petition for appeal was filed September 25, 1936, and allowed the same day (R. 579). The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III),

and Section 283 of the Judicial Code, as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). Probable jurisdiction found March 1, 1937.

QUESTIONS

Following a general investigation by the Commission into the practices of railroads (sometimes followed and sometimes not) of performing, as under the line-haul rate, the "spotting" of cars within industrial plants, or of paying allowances to industries doing the "spotting" with their own locomotives, the Commission issued a main report in which it announced the general "principles" as to operating circumstances and conditions within a plant to be applied in determining whether reasonable delivery, or receipt, of cars under the line-haul rates covers "spotting" service within the plant. Supplemental reports have been issued relating to the situations at particular plants, including the supplemental reports, here involved, which deal specifically with the circumstances and conditions shown of record to exist at the plants of the appellees in these cases. Cars consigned to or by appellees are delivered to and received from them by the railroads at interchange or "storage" tracks located upon or at the entrance to appellees' plants. With their own locomotives, appellees (except Weirton Steel Company) "spot" the cars between the interchange tracks and particular unloading and loading points *when and as needed* by their in-

dustrial operations and under other circumstances later to be described; and they are paid allowances for such "spotting" by the railroads. At the plant of the Weirton Steel Company, by locomotives specially assigned, the railroad performs the "spotting" free or without charge in additon to the line-haul rate. Based upon underlying findings as to circumstances and conditions at the several plants the Commission found substantially in all cases here involved that the interchange tracks constitute reasonably convenient points for delivery or receipt of cars; that the railroads' transportation services under the line-haul rates begin and end at the interchange tracks; and that it results that the railroads, by payment of the allowances or by performing the "spotting" provide appellees with a preferential service not accorded to shippers generally, and refund a portion of the rates in violation of section 6. Orders were entered in each case directing the railroad or railroads to cease and desist from the practices. The ultimate question is whether the lower court erred in holding that the Commission's orders were invalid. Subordinate questions bearing on the validity of the orders are:

1. Whether the Commission exceeded its statutory authority.

2. Whether it made the necessary findings of fact.

3. Whether its findings and orders were supported by substantial evidence.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from final decrees of the United States District Court for the Western District of Pennsylvania, sitting as a specially constituted three-judge court, permanently enjoining and setting aside the orders of the Commission above described.

Appellees are all corporations with offices and places of business located in the Western District of Pennsylvania.

Appellees all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other appellees are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brackenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Company except the plant of the Pittsburgh Plate Glass Company lo-

cated at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis, San Francisco Railway Company.

THE COMMISSION PROCEEDING

The Commission proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, in which the six orders in controversy were issued, is Part II of an investigation instituted July 6, 1931, upon the Commission's own motion "into practices of carriers affecting operating revenues or expenses" which for convenience was divided into different parts. The Commission's investigation was undertaken under section 13 (2) of the Act, which, *inter alia*, empowers the Commission to institute proceedings on its own motion as to any matters concerning which a complaint is authorized, "or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." Section 12 (1) of the Act authorizes the Commission to inquire into the management of the business of the carriers, imposes upon it the duty to keep itself informed as to the manner and method in which the same is conducted, and provides that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." Part II of the proceeding related to the "spotting" of cars at industries, the Commission's "main" report (R.

10) specifying the matters covered as follows (R. 14):

> Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:
>
> 1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:
>
> Group A, where the industries perform these services and receive compensation therefor from respondent carriers.
>
> Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and
>
> Group C, where respondent carriers perform the services at the special convenience of the industries.
>
> 2. Whether, in circumstances where such services are performed by the industries,

> any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services.

Hearings were held at practically all the larger cities of the country, a record of about 18,000 pages of testimony and more than 500 exhibits being made. During the course of the hearings testimony and evidence describing and relating to the service of so-called "spotting" of cars involved on the tracks of particular plants was taken, including those of appellees herein, which enabled the Commission to reach determinations and deal by supplemental reports with the practices of the carriers at particular industries or plants.

The Commission's orders, involved in the respective suits, are to be read together with the reports which are made parts thereof. *Am. Exp. Co.* v. *Caldwell*, 244 U. S. 617, 627; *Georgia Comm.* v. *United States*, 283 U. S. 765, 771.

After concluding the hearings the Commission, on May 14, 1935, issued its first or "main" report (R. 10), in which it discussed generally the historical and legal aspects of "spotting" service and reviewed and discussed generally the facts disclosed in the record before it. Describing that service the report reads, in part (R. 14–16):

> The service rendered in placing cars on and removing them from team tracks

and private sidings is well known. It consists of the placing of cars at or their removal from a point on such tracks reasonably convenient to both the carrier and the shipper. A description of the service involved on tracks of individual industrial plants will be dealt with in subsequent reports, but in general it may be stated as follows: The industries heard on this record have systems of tracks within their plants which vary in extent from a few tracks aggregating only a few hundred feet in length, to extensive systems many miles in length. These industries are served in one of two ways, i. e., inbound and outbound cars are delivered or received by the carriers on interchange tracks which either compose an extensive yard or designated tracks from and to which interchange track the spotting service is performed by locomotives belonging to the industry served, for which service in many instances the industry receives an allowance from the carrier while in other instances such service is performed by the industry at its own expense; or by the other method the spotting service is performed by the carrier. In the majority of such instances the spotting is performed by the carrier at its convenience and without interruption or interference by the industry. In other instances cars are first placed by the carrier on interchange tracks from which they are subsequently moved by a carrier engine or engines assigned to the plant and

operating entirely under the direction of the industry and spotted when and as needed by the industry without charge in addition to the line-haul rate or switching charge otherwise applicable. At the latter group of industries the services are substantially the same as at the industries where the spotting service is performed by plant power. This report will principally deal with the class of industries to which an allowance is paid by the carrier as compensation for rendering service which it is urged is within the obligation of the carrier under the line-haul rate, and those to which the carriers assign power to perform the spotting service. * * *

Numerous other industries heard on this record use locomotives for the identical purposes and in the same manner, but receive no allowance therefor, * * * * * *.

The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a

> solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable.
> * * *
> * * * * * *
> The tariffs publishing the line-haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience.

The payment of allowances by railroads to industries for performing "spotting" within their plants appears to have started in the eastern industrial sections and the instances thereof gradually became more numerous in that part of the country until about 1915. Their spread in Pennsylvania and Ohio was more rapid after the end of federal control of the railroads. In 1921, the first important allowance was granted in the Illinois-Indiana industrial region, and others rapidly followed extending into the part of the Mississippi Valley west of the river. Some allowances have been granted in the north-central and extreme northwest sections and at present the only sections of the country where allowances are not paid are New England, the Southeast and the ex-

treme Southwest.[1] While the practice of granting allowances is more prevalent in the eastern industrial sections than elsewhere, the carriers in those sections by no means grant allowances to, or perform "spotting" for, all industrial plants served by them. This is shown by exhibits introduced by them, which will later be discussed. Furthermore, rules promulgated by the Traffic Executive Association, eastern territory (Appendix A, Commission's "main" report, R. 45), to govern the granting and computation of "plant facility allowances" show recognition of decided limitations upon the carriers' obligations to perform "plant spotting" under the line-haul rate, or to assume the costs thereof. These rules are discussed in the Commission's "main" report (R. 33-35). Moreover, the opening paragraph of the rules (R. 45) states that: "In view of the conditions under which plant facility allowances have developed it was the concensus that such allowances should be limited to iron and steel industries. * * *"

The allowances paid by the railroads to the particular industries receiving them are published in tariffs (R. 5, 59, 76) in the nature of exceptions to

[1] Main Report, 209 I. C. C. 11, 33, 34. (R. 32-33.) Or. Tr., Vol. II, p. 11315; Vol. 9, p. 9477; Vol. II, p. 11349; Vol. 7, ex. C-22; Vol. 8, p. 8035; Vol. 7, p. 7137; Vol. 3 of exhs. ex-A-48, p. 155; Vol. 4 of exhs. ex-C-22, p. 297. Or. Tr., has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586.)

the line-haul rate tariff, the assumption being that the "plant spotting" is transportation service under the line-haul rate, for performance of which the industries are entitled to compensation under section 15 (13) of the Interstate Commerce Act.

The Commission entered no general order with its main report, but its report announced the general principles as to operating circumstances and conditions within a plant to be applied in determining whether reasonable delivery, or receipt, of cars under the line-haul rate covers "spotting" service within the plant. The standard laid down is what has long been termed the "equivalent of team track, or simple switching, delivery", but it should be noted that the Commission defines or specifies service that is to be regarded as in excess thereof, the text of its report reading (R. 43):

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of Appendix A, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team track delivery.
>
> * * *

Following its main report, the Commission issued supplemental reports with respect to the situation at particular plants, including the above-named supplemental reports involved herein. Later chapters of this brief will discuss separately each of the supplemental reports and supporting evidence involved in the respective cases. For the purpose of this preliminary statement the supplemental report in Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273 (R. 66) may be used as generally illustrative of the situation shown in all of the supplemental reports involved in these cases. It is shown in that report that the Allegheny Company has approximately 150 industrial tracks and sidings with an aggregate length of about 10 miles within its 100-acre plant, owns 7 locomotives, of which 5 are in regular operation; that there are 11 important points where cars are spotted for loading and unloading, also 3 scrap yards and 5 additional locations where cars are loaded and unloaded by locomotive cranes. The supplemental report further states that a necessary part of the industrial operations is the weighing of cars when loaded and also when empty and that this weighing and other industrial operations would prevent the performance of the spotting service within the plant by the line-haul carrier in an uninterrupted movement at the carrier's convenience. A witness for the Allegheny Company testified that any switching by the carrier within

the plant would necessarily have to be performed at the convenience of the industry; that the placement of cars as and when needed by the industry would be required. In other words, as said in the report "switching service rendered at respondent's convenience might delay manufacturing activities and it appears that the plant cannot be operated satisfactorily unless switching power is constantly available." From testimony of the railroad, it appears also that the tracks within the plant would not accommodate switching locomotives of the type used in that locality, and that in order to perform the industrial spotting over the tracks provided by the industry, the carrier would have to bring in smaller locomotives from some other portion of the system and assign them to the exclusive use of this particular plant.

The conclusions reached by the Commission in all six supplemental reports are substantially the same, and those contained in the report of the Allegheny Steel Company case may be used as illustrative, as follows:

> Satisfactory spotting service at this industrial plant necessitates many switching movements daily between the interchange tracks and the points of loading and unloading. It is apparent that the switching service performed in spotting cars greatly exceeds ordinary team-track or simple switching delivery and is in excess of that which may be lawfully required of respondent under its

line-haul rates. Terminal Allowance to St. Louis Coke & Iron Co., 85 I. C. C. 591, 600.

We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the carriers to perform for the steel company begin and end at the interchange tracks, and that the switching movements by the steel company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondent carrier to perform under its line-haul rates.

We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the Act.

An appropriate order will be entered.

The orders entered in the six cases are similar, and the following one is typical:

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The

Pennsylvania Railroad Company to the Allegheny Steel Company for performance by the latter of spotting service within its industrial plant at Brackenridge, Pa., and the Commission having under date of May 14, 1935, made and filed a report, Propriety of Operating Practices—Terminal Services, 209 I. C. C. * * *, containing its legal conclusions with respect to the general situation presented and the division having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Allegheny Steel Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 1, 1935, and thereafter to abstain from such unlawful practice.

PROCEEDINGS IN COURT BELOW

July 25, 1935, the petitions were filed in the court below in causes numbered 3110, 3111, 3112 and 3113 (R. 10; 52, 70, 87). July 31, 1935, interlocutory injunctions were entered restraining enforcement of the Commission's orders involved in said causes. (R. 191–194.) August 31, 1935, and October 8,

1935, the petitions were filed respectively in causes numbered 3130 and 3136 (R. 104; 120). September 12, 1935, and October 22, 1935, interlocutory injunctions were entered respectively in said two causes (R. 194–197). October 22, 1935, all six causes were consolidated for hearing and were orally argued by counsel (R. 513.) The consolidated cases were submitted upon the petitions, to each of which was attached the Commission's main report and its supplemental report involved in the particular case, upon the answers of the United States and of the Commission, and upon a certified copy of the record made before the Commission (R. 514–515). May 23, 1936, the court rendered its opinion, holding that the Commission's orders in all of the cases were invalid (R. 531–535). July 29, 1936, the Court filed its Findings of Fact and Conclusions of Law (R. 571–573), and on the same day entered final decrees permanently enjoining the Commission's orders (R. 574–577).

SPECIFICATIONS OF ERRORS

The following errors of the District Court are urged herein.

1. In entering the decrees enjoining, setting aside, and annuling the orders of the Interstate Commerce Commission.

2. In holding that the switching and "spotting" of cars within the respective industrial plants of the plaintiffs is "transportation" within the

meaning of Section 1 (3) of the Interstate Commerce Act.

3. In holding as follows: "By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right-of-way, and also on private industrial tracks off the carriers' right-of-way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide."

4. In holding that " 'spotting services' are recognized in law as common-carrier services to which the shippers are entitled, and which the carriers are in duty bound to perform."

5. In holding that in these cases there are "no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as a part of the transportation imposed upon them by law."

6. In holding that the "spotting" of cars within the industrial plants of the plaintiffs "is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this 'spotting service' themselves they are entitled to the compensation provided for in the published freight tariffs."

7. In holding that the Commission's orders in these cases are not based on jurisdictional findings necessary to support them and that the injunctions sought should be granted in all these cases.

8. In holding that "the Commission was without power to prohibit entirely allowances for doing 'spotting service.'"

9. In holding that the Commission had power only to "review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful", and in holding that the Commission failed to make findings sufficient to support its orders.

10. In holding that the orders of the Commission in these cases are beyond its statutory power, and that the injunctions prayed for should issue.

11. In accepting and adopting the findings of fact and conclusions of law suggested by the plaintiffs, and in failing to sustain defendants' objections thereto, and in refusing the findings and conclusions suggested by the defendants; and the court particularly erred in entering its findings numbered "3", "4", "5", "6", "7", and "9", and in finding as facts the matters and things therein stated.

12. In the several conclusions of law which it entered, and in each of said conclusions.

13. In failing and refusing to hold that the Commission's orders in these cases are within the power conferred upon it by the Interstate Commerce Act.

14. In failing and refusing to hold that the findings made by the Commission in each of these cases are sufficient to support the respective orders.

15. In failing and refusing to hold that each of the orders in these cases is supported by substantial evidence.

16. In failing and refusing to dismiss the petition in each of these cases for want of equity.

SUMMARY OF THE ARGUMENT

I. The orders in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates or payment of allowances to appellees for performing their own "spotting", were within the Commission's authority under the Interstate Commerce Act. Where work done by the shipper is in fact a part of the transportation service under the line-haul rates, the Government does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13)). But no allowance is due for service rendered by the shipper, and no additional service may be rendered by the carriers free, after delivery has been made and transportation has ended or before it has in fact begun. *New York Central & H. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 117 (cert. den. 243 U. S. 636); *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. In each of these cases the Commission has found and determined, after hearing and upon evidence, what constitutes complete delivery or where transportation begins and ends; that the

transportation services which the carriers are obligated to perform at these plants under tariffs publishing their line-haul rates but not specifying the precise point where cars will be received or placed within a terminal area, begin and end at the interchange tracks; that the service beyond is plant service, and that, accordingly, the allowances provide the means by which appellees receive preferential service not accorded to shippers generally, and constitute unlawful refunds of a portion of the line-haul rates.

The determination of what constitutes delivery or where transportation begins and ends is one of fact, primarily within the province of the Commission, to be made upon evidence disclosing "the actual conditions of operation." *Los Angeles Switching Case*, 234 U. S. 294, 311; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *L. & N. R. R. Co.* v. *United States*, 282 U. S. 740, 757; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240.

(1) The court below erred in holding that the carriers are obligated to pay the allowances or perform the spotting because of an asserted general custom and practice of railroads in delivering and receiving cars on private industrial tracks and the absence of any circumstances in the instant cases which would relieve them from such duty. It has never been, and is not now, general railroad custom

and practice to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate: (a) Court decisions, cited herein, show that there has been no such custom and practice, and that cases of an interior movement of plant traffic and of deliveries through a system of interior switching tracks constructed as plant facilities have been consistently distinguished by both the courts and the Commission from ordinary private side-track deliveries. (b) Evidence of record of many kinds sharply disproves the existence of any such general custom and usage, and shows, instead, that there has developed among many carriers a practice, more prevalent in some regions than in others, of paying allowances to or performing plant spotting for some industries, and of not paying allowances to or performing plant spotting services for other industries. The Commission's report points out, and appellees do not deny, that throughout the Southeast the carriers pay no allowances and perform no plant spotting; that no allowances are paid in the extreme Southwest, and that the New England carriers maintain that allowances are improper and that where industries specify tracks on which cars are to be interchanged the placing or receiving of cars at such tracks constitute delivery or receipt by the carrier under line-haul rates (R. 32–33). While the practice is more prevalent in the Eastern industrial section the carriers in that section by no

means either grant allowances to or perform spotting for all industrial plants served by them. For example, the evidence of the Pennsylvania Railroad shows 125 industries on its lines which perform their own spotting without allowances, 59 industries which receive allowances for performing their own spotting, 18 industries where the spotting is performed in part by the railroad and in part by the industry without an allowance, and 833 industries (having two or more tracks) at which the railroad does the spotting. The record is replete with evidence of many other railroads showing similar facts with respect to the payment or nonpayment of allowances to industries on their lines. As late as 1920 a special committee of railroads operating in official territory (East of the Mississippi River and North of the Ohio River) reported that practices among those carriers with respect to plant spotting services were irregular and inconsistent and demanded a remedy; and in 1929, a committee of eastern carriers sought, unsuccessfully, to promulgate general rules for the very purpose of establishing uniform custom and practice in the matter of performing plant spotting or paying allowances therefor.

(2) The district court erred in holding that the Commission was "without power to prohibit entirely allowances for doing 'spotting service'", and that it exceeded its power in issuing the orders. Section 15-(1) of the Act expressly authorizes the

Commission to issue a cease and desist order whenever, after hearing upon complaint or its own motion, it finds a rate or practice to be unreasonable, unjustly discriminatory or unduly preferential, "or otherwise in violation of any of the provisions of this Act." Section 13 (2) empowers the Commission "to make and enforce any order" in any case and "as to any matter or thing concerning which a complaint is authorized to be made * * *, or concerning which any question may arise under any of the provisions of this Act." Section 15 (13) provides for an allowance *if* the shipper renders any transportation service in connection with his shipment, and authorizes the Commission to fix the amount of the allowance "by appropriate order." It is obvious that such allowance is a matter or thing concerning which a complaint is authorized to be made; that payments under the guise of an "allowance" for services which are not included in the carrier's obligation under its rates constitute plain "refunds" of a portion of the tariff rates in violation of Section 6 (7) as found by the Commission in these cases, and violations of other provisions of the Act, as in *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513, where such allowances were held to be "rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act", and thus a proper matter for a cease and desist order by the Commission. The lower court's denial of the Commis-

sion's power to prohibit allowances entirely upon a finding that the service for which they are paid is not in fact a transportation service under its line-haul rates, ignores the provision of Section 15 (1) authorizing the issuance of orders where the Commission finds a rate or practice to be "otherwise in violation of any of the provisions of this Act", and is contrary to decisions of the courts and the Commission cited in this brief.

II. The findings made by the Commission in each case are sufficient to support the respective orders. The supplemental report in each case finds and sets forth all pertinent facts concerning the physical plan and arrangement of the particular plant, the plant tracks, the railroad tracks and spurs, and the circumstances and conditions under which the spotting service is and must be performed. From these facts the Commission finds substantially in all of the cases that the interchange tracks constitute reasonably convenient points for delivery or receipt of shipments; that the carriers' transportation services under the line-haul rates begin and end on the interchange tracks, that the service beyond is a plant service, and that accordingly the carriers may not lawfully perform the service or pay allowances to appellees for performing it, that the allowances provide the means whereby appellees enjoy preferential service not accorded shippers generally, and constitute refunds in violation of Section 6 of the Act. These

findings are clearly sufficient to meet the requirements of the Act (Section 14) and of the applicable decisions of this Court. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *United States* v. *Louisiana*, 290 U. S. 70; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *A., T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. Compare *Merchants Warehouse Co.* v. *United States, supra*, and *Los Angeles Switching Case, supra.*

III. The orders are supported by substantial evidence. The evidence abundantly establishes all of the facts found and recited in the supplemental reports; it furnishes a precise description of appellees' plants; it fully describes the work of the railroads in delivering and receiving cars upon the interchange tracks and the "spotting" service performed at each of the plants; it shows the conditions under which the spotting service is and must be performed because of the nature and requirements of appellees' manufacturing operations, and it describes the physical and other obstacles and conditions within the plants which prevent the carriers from performing the service at all, or at their own reasonable convenience. Appellees' contention really is that the Commission drew improper conclusions from the evidence which the record does contain, and not that the evidence contains insufficient facts to justify the Commission in reaching its conclusions. The evidence in these cases is of

similar type and probative effect to that held sufficient to support the orders in *Merchants Warehouse Co.* v. *United States, supra,* and *L. & N. R. R. Co.* v. *United States,* 282 U. S. 740, 757–758, and is clearly sufficient to support the orders under the rule laid down by this Court in *Los Angeles Switching Case, supra,* where it said that (p. 311) questions of the type here involved are "to be determined according to the actual conditions of operation."

ARGUMENT

INTRODUCTORY

Where work done by the shipper is in fact part of the transportation service under the line-haul rates the Commission does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13)).[2] But in these cases the only assumption that could support the allowances out of the rates is that the carriers, after making placement of the cars on interchange tracks at or within the plant, are still obligated by their rates to place special locomotives and crews at the "beck and call" of the industries, the locomotives often of a design and size different from those used in the vicinity and with the crews working to distribute cars at such times and to such points as is desired and as will not interfere with other activities of the plants. What the Commission found

[2] Appendix I, pertinent statutory provisions.

was that, under these circumstances and others, placement of the cars upon, or taking them from, the interchange tracks within or at the plant, constituted under the rates delivery, or receipt, of the shipments at a reasonably convenient point; that the transportation services which the carriers are obligated to perform begin and end at the interchange tracks; and that, accordingly, the allowances from the rates are not for transportation services which the carriers are obligated to perform thereunder, but provide the means by which appellees receive preferential service not accorded to shippers generally or a refund of a portion of the line-haul rates.

In contrast, the decision of the court below is, in substance, that the service in question is part of the carriers' transportation obligations under the line-haul rates (R. 535) and, accordingly, since appellees are doing it with their own plant railways, the allowances made to them out of the rates are paid as compensation for doing work which is made the railroads' obligation by the rates.

We do not understand the court below to mean that the line-haul rates *in terms* provide for such service to or from the precise unloading or loading "spots",[3] to be performed as a "stand-by" service

[3] Appellees' petitions made no such contentions, but concede that the line-haul rates do not state "the precise spot in such city, town, or station locality, at which they undertake to receive or deliver freight." (R. 55; 72; 90; 107; 122.)

when and as meeting the plants' activities. The obligation arises, so it is concluded, because "spotting service" is "transportation" within the definition of section 1 (3) of the Act and is, therefore, a common carrier service "up to certain limits", because of the long continued custom and practice of making such placements both on the carriers' terminal tracks and also on private industrial tracks on the private property of industries served, and because the line-haul tariffs do not in *express terms* exclude such services. (R. 534.) The decision states that there is no exact formula that can be applied; that the limits of place within which delivery is due will vary with varying conditions; and that such delivery is required as is customary and reasonable (R. 534). And the decision specifies certain typical circumstances that would relieve the carrier from the duty of "spotting" cars (R. 534). But "in the instant case", the court finds, there are "no circumstances which would relieve the carriers involved from" such duty. (R. 535.)

The court also held that the Commission was without power to prohibit entirely the allowances to appellees for doing their own spotting service; that, since the Commission had not found that the allowances were unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful, the orders were void (R. 535).

I

The orders issued by the Commission in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates, or payment of allowances to appellees for performing their own "spotting", were within its authority under the Interstate Commerce Act

1. It has never been, and is not now, general railroad custom and practice to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate

As above shown, the court below, relying upon the definition of "transportation" in section 1 (3) of the Act and upon what it stated to be "the long continued custom and practice", concluded that the "spotting services" between interchange or storage tracks and unloading and loading points within the plants of appellees were included in the carriers' obligations under their line-haul rates, except under certain special circumstances, typical examples of which are set forth in the court's opinion. (R. 534, 535.) And the court found that, in the instant cases, there were no circumstances which would relieve the carriers of such obligation. Earlier in its opinion the court had said there was no exact formula that could be applied and that the decided cases showed that the limits of place within which delivery is due will vary with varying conditions and that such delivery is required as is customary and reasonable. (R. 534.)

Plainly the answer to the question is one of fact and the provisions of the Interstate Commerce Act,

both express and implied show that it is, primarily, within the province of the Commission to determine what terminal services are included in the line-haul rate according to the actual conditions of operation. Compare *Los Angeles Switching Case*, 234, U. S. 294, 311. It is the duty of the Commission to find what constitutes complete delivery or where transportation ends. *Atchison Ry.* v. *United States*, 295 U. S. 193, 201.

The mere assertion, as made by appellees, in the court below, of a long continued general custom to include "plant spotting" in the line-haul rate does not establish such general custom. A long continued general custom has to be established by facts and when the facts show that the alleged general custom is simply a practice (and even that not followed by all railroads or in all sections of the country) of performing such service for, or granting allowances to, particular patron industries and not to others, the question had to be answered just as it was answered by the Commission in these cases, namely, by the ascertainment as to what constituted reasonably convenient points for delivery and receipt of shipments, under the actual circumstances and conditions of operation confronting the carriers.

The Commission found that the railroads had not withheld the handling of cars to agreed interchange tracks and that such tracks correspond to the spurs or sidings on which spotting had its

origin; but as to the spotting service beyond, consisting of the distribution of the cars to meet the needs of the plants, it found that the uncontroverted facts showed that such form of delivery was not "customary." (R. 16.)

(a) Court decisions show that there has been no "such custom and practice"

The *Los Angeles Switching Case*, 234 U. S. 294, involved an order of the Commission requiring carriers serving Los Angeles to desist from making a charge in addition to the line-haul rate for deliveries to industries located on spurs, or sidings, within the boundaries of the Los Angeles switching district. The Commission had found that the spurs, or sidings were in a real sense portions of the terminals of the carriers (p. 307); that spur-track delivery is a substitute service and not supplemental to any other delivery (p. 308); that carriers throughout the country customarily so "treat industry spurs of the kind here in question," the only exceptions being, apparently at the cities of Los Angeles, San Francisco and San Diego (p. 311). The thing of immediate importance in that decision is that the Court, in upholding the Commission's order, twice mentioned (pp. 307, 310) that the Commission in making its ruling had expressly distinguished:

> Cases of an interior movement of plant traffic to and from various parts of the establishment and of deliveries through a

> system of interior switching tracks constructed as plant facilities. * * *

See *General Electric Case*, 14 I. C. C. 237; *Solvay Process Case*, 14 I. C. C. 237; *Crane Iron Works Case*, 17 I. C. C. 514, 209 Fed. 238, 242; *C. & A. R. Co. v. U. S.*, 156 Fed. 558. In the *General Electric Case* (N. Y. Ct. of Appeals), 114 N. E. 115, the decision, after citing the above cases, reads, pp. 118, 119:

> In the Industrial Railway Cases (29 I. C. C. 212, 230; 34 I. C. C. 596, 601) the Commission reaffirmed its previous rulings, and pointed out (29 I. C. C. 235) that they were in harmony with the prevailing practice in England and in Germany. See, also, Karl Lumber Co. v. C. of G. Ry. Co., 20 I. C. C. 450, 455; Mfrs. Ry. Co. v. St. L. M. & S. Ry. Co., 21 I. C. C. 304, 315 * * *. We find the same distinction between plant facilities and true agencies of transportation in the decisions of the Supreme Court. Sometimes the application of the distinction by the Commission has been disapproved, but always the validity of the distinction has been assumed, and the General Electric and Solvay Process Cases have been cited to illustrate its meaning. This was done in the Tap Line Cases, 234 U. S. 1, 23 * *. Day, J., writing for the court, explained the meaning of plant facilities by reference to the General Electric and Solvay Process Cases, and, commenting on them said:

"These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and operated them."

See, also, opinion of the Commerce Court in that case (Louisiana & R. Ry. Co. v. U. S., 209 Fed. 244, 257). Again, in the Los Angeles Switching Case, 234 U. S. 294, 310, 34 Sup. Ct. 814, 818, (58 L. Ed. 1319), Hughes, J., writing for the Court, said that the receipt and delivery of goods at plants located upon spurs or side tracks was sometimes a distinct service; and distinguished from the case before him, "cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities."

Study of the *General Electric Case, supra,* will show that the opinion makes accurate analysis of court decisions, which are still leading cases on the subject matter; that it gives true effect to the *Tap Line Cases,* 234 U. S. 1[1] as applicable here, and precisely follows the principles running through the decision in the *Los Angeles Switching Case, supra.*

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[1] In the *Tap Line Case* the Commission orders were not upheld, the decision being governed, however, by the fact that the industrial railways involved were common carriers incorporated and holding themselves out as such and in fact doing business for the public.

(b) Evidence of record, of many kinds, sharply disproves the existence of any such general "custom and usage"

Aside from what is disclosed in court decisions, the record shows that there has in fact been no custom and usage of making "deliveries through a system of interior switching tracks constructed as plant facilities." *Los Angeles Case,* p. 310. There has been a practice, more prevalent in some regions than in others, of making such deliveries (plant spotting) for some industries, or of paying allowances, and of not doing such plant spotting for other industries or paying them allowances. A brief statement of the start of the practice of paying allowances for "plant spotting" and its spread to certain sections of the country has been given in the opening statement. One thing that is apparent is that the practice, once started as to a particular industry rapidly spreads to others.[5] But, while the practice is followed in considerable measure in the eastern industrial section, the carriers in that section by no means either grant allowances to, or perform the "spotting" for, all industrial plants served by them.

As illustrative of the situation, we refer to Ex. 150 (Or. Tr., Vol. I of Exhibits, pp. 460–477) introduced by the Pennsylvania Railroad which shows in particularly compact form the situation on that road in respect of spotting service. Mr. Orcutt, counsel for the Pennsylvania, referring to

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[5] Ex. A–48, p. 155, Vol. 3 of Exhibits of the Original Transcript; Ex. C–22, p. 297, Vol. 4 of Exhs., Or. Tr.

that exhibit said (Or. Tr., Testimony, Vol. 3, p. 2057):

> Mr. Director, I have distributed and have given to you a statement containing the industries located on the Pennsylvania Railroad, separated as between the common carriers, the industries performing their own service for an allowance, those performing the very service and receiving none, those where the railroad performs the service, and those where the industry performs part of the service and the railroad likewise a part. * * *

The exhibit referred to lists, in column 2–c, 833 industries which have systems of tracks, and for which the railroad does the spotting. It should be noted that for purpose of the compilation any industry having *two or more tracks is an industry having a system of tracks,* although industries having a single siding are not included. (Vol. 3, p. 2062.) The exhibit lists, in column 2–a, 59 industries which perform their own spotting and are paid allowances by the railroad; it lists, in column 2–b, *125 industries* which perform their own spotting without allowances from the railroad; and it lists 18 industries where the spotting is performed in part by the railroad and in part by the industry, the latter receiving no allowance. (Vol. 3, p. 2058.)

The Pennsylvania's Exhibit 153 (Or. Tr., Vol. I, Exhibits 519, listing plant facility allowances paid

by that railroad) shows only 1 such allowance paid in Michigan, 3 in Illinois, and 7 in Indiana.

Concerning certain other railroads whose lines serve both the eastern industrial regions and the Chicago District: In exhibits, showing inter alia what industries on their lines did their own spotting without being paid allowances, the Erie named two industries on one division, four industries on another divison, four other industries on still another division and four other industries on other lines (Exs. 82, 83, 84, 158, Vol. I of Exhibits);[6] the Baltimore & Ohio named in Ex. 115 (Vol. I of Exhibits) more than 20 well-known industries, in Ex. 122 (Vol. I of Exhibits) eight industries in Ohio and Western Pennsylvania, in Ex. 125 (Vol. I of Exhibits) 11 industries in Pennsylvania and West Virginia; the Detroit & Toledo Shore Line named three industries (Ex. 167, Vol. I of Exhibits); and the Michigan Central named 14 industries (Ex. 174, Vol. I of Exhibits). The Baltimore & Ohio Chicago Terminal Railroad lists 5 industries on its line which receive allowances for doing their own spotting and 2 which do their own spotting without an allowance. (Exhibit 245, Vol. I, Exs. pp. 150–151.) The Baltimore & Ohio Railroad lists (Ex. 243, Vol. II, Exs. p. 123) for its Toledo division, no industry doing spotting for an allowance, and 4 industries doing their own spot-

[6] All record references in this paragraph are to the Original Transcript.

ting without allowances; for its Newark (Ohio) division, no spotting for allowances, and 2 industries spotting without allowances (pp. 134–135); for its Cincinnati terminal district (Ex. 239, Vol. II, Exs. p. 89) 2 industries which receive allowances for spotting, and 5 which do their own spotting without allowances. The Chicago, Milwaukee, St. Paul & Pacific Railroad shows 42 industries on its lines which perform their own spotting without an allowance and 12 industries which receive allowances for spotting (R. 3877, Ex. 263, Vol. II, Exs. pp. 222–223). The Chicago, Rock Island & Pacific Railway shows 4 industries receiving allowances for spotting and 5 which spot their own cars *without* allowances (Ex. 281, Vol. II, Exs. pp. 394–399, 400–407). The Chicago & North Western Railway shows 36 industries which perform all or part of their own car-spotting, and of these, 7 receive allowances and 31 receive *none*. (Of these 31, "steam power" is used by 21, and electric or gas engines by the others, one of which uses "narrow gauge" power.) (Ex. 268, Vol. II, Exs. p. 290.)

In this connection, too, mention is made of the rules promulgated by the carriers' committees to govern the making of allowances. These rules are attached to the Commission's main report, Appendix A,[7] and they are discussed at some length in

[7] Or. Tr., Vol. I of Exh's., Ex. 106, p. 297; Vol. II of Exh's., Ex. 264, p. 251.

the report itself. (R. 33–35.) As there said, in substance, the rules show a marked attempt by the carriers to separate the services for which they are obligated. Rules 3 (c), 9 and 10, sec. 18 (R. 46, 48). Also, the opening paragraph of the rules states that, in view of the conditions under which "plant facility allowances have developed it was the consensus (a) that such allowances should be limited to iron and steel industries * * *." True, the cases before this court (and others) show that allowances have not been limited to iron and steel industries; but they and the rule just quoted show lack of custom or uniform treatment of shippers in the matter of allowances.

The correspondence and memoranda embodied in this record as Ex. C–139,* Witness Julius Eysmans, Vice President of the Pennsylvania Railroad, are particularly informative with respect to the efforts made on the part of carriers in Official Classification territory to adopt a uniform policy which would settle the question as to the extent of service which the carriers should perform under the line-haul rates. This exhibit is referred to in the Commission's main report (R. 17, 18) and supports what is there said that:

> About 1920 a special committee of carriers operating in official territory made a study of the practices in that territory with respect

* Or. Fr., Vol. V of Exhs., p. 115, Vol. 10 of Tes., p. 9988.

> to the spotting service. This special committee reported that the practices were irregular and inconsistent and demanded a remedy. * * * It recognized that much of the service for which allowances were paid was service which was in excess of the carriers' obligations under their line-haul rates and proposed that a tariff be issued for account of the carriers in that territory. * * *
>
> The proposed tariff provided that where spotting service could not be performed on private or industrial sidings by means of one simple switching movement, a uniform charge should be applied for the remainder of the service; and that where an industry performed spotting service which was properly a carrier's duty, an allowance in an amount uniform to all such industries might be paid.
>
> Due mainly to the opposition of the National Industrial Traffic League, the proposed tariff was never published. This record shows that the irregularities, inconsistencies, and demand for remedial measures, which were found by the special committee to exist, still exist, and have since been greatly multiplied.

In *Ass. Jobbers of Los Angeles* v. *S. F. Ry. et al.*, 18 I. C. C. 310, cited by appellees in the court below as authority for the asserted "custom and usage" and which is the case that was upheld in the above-mentioned *Los Angeles Switching case,*

234 U. S. 294, the Commission simply said, as appears by this court's decision at page 311:

> * * * It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question "as portions of their terminals, making no extra charge for service thereto when a carrier receives the benefit of the line haul out or in." It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco, and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.
>
> Such a question is manifestly one upon which it is the province of the Commission to pass.

The industry spurs of the kind there in question were not "systems of interior switching tracks constructed as plant facilities" (p. 310); for, as already noted, this court's opinion said that the Commission had expressly distinguished cases of such

kind. Also of significance is the fact that this court preferred to lay "the generalization to one side" and to pass to the Commission's determination as based on actual operating conditions.

2. The Commission's orders were within its authority under the act

The court below held that the Commission was without statutory power to make the orders in these cases. The opinion reads (R. 535):

> As we view the law, the Commission was without power to prohibit entirely allowances for doing "spotting service". It could review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful: Section 15 (par. 1) and (13) of Interstate Commerce Act; * * * No such findings were made in the instant cases.

The rationale of this holding is not clear but it seems to be that the Commission's power to make orders affecting allowances must be found wholly within Section 15, and that, since that section does not expressly declare, in terms, that the Commission may issue orders prohibiting allowances for "spotting service", it is without power to do so. In any event, the court's holding is patently erroneous for it not only ignores the other sections of the Act, which, under the elementary principle of statutory interpretation, must be read and construed together with the provisions of Section 15,

but it also misconstrues that section. Considered alone, Section 15 plainly confers the power to make the orders in these cases. Paragraph (1) of that section provides that whenever, after hearing, upon complaint or upon its own motion, the Commission shall be of opinion that any rate, fare, or regulation, or practice whatsoever is or will be unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, "or otherwise in violation of any of the provisions of this Act", the Commission "is hereby authorized and empowered to determine and prescribe" the rate, fare, charge, regulation, or practice which is or will be just, fair and reasonable, to be thereafter followed, and "to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Thus, the power conferred by Section 15 (1) to make orders extends to rates, practices, etc., which the Commission may find to be unreasonable, unjustly discriminatory or unduly preferential or prejudicial, and also, in terms, extends to and includes rates and practices which the Commission finds to be "otherwise in violation of any of the provisions of this Act." Certainly the Commission found that the carriers' practices were in violation of section 6 in that they provided appellees with a preferential service not accorded to shippers generally, or were refunds out of the rates. Certainly

the proceeding has demonstrated, more than any other, that, as to certain violations of that section, there is no rigidity of statutory rule, but that investigation and fact finding by the qualified administrative body into the circumstances and conditions of actual operation are necessary and are intended by the statute. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240; *L. & N. R. R.* v. *United States*, 282 U. S. 740, 752.

Section 15 (13), under which the right to allowances is claimed, and which is cited in the above quotation from the opinion below, provides that, *if* the owner of property transported renders any service connected with such transportation the charge or allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable maximum charge for such service "and fix the same by appropriate order." And, paragraph (14) of the same section provides that "the foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

Moreover, power to make the orders is obviously conferred by the more sweeping and comprehensive language of Section 13, under which the Commission's investigation was instituted. Paragraph (1) of that section authorizes a complaint to be made to the Commission concerning "anything

done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof", and paragraph (2) empowers the Commission "to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, * * * or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act", and, further, "to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had * * *."

Clearly, an allowance under Section 15 (13) to a shipper is a "matter or thing concerning which a complaint is authorized to be made * * * or concerning which any question may arise under any of the provisions of this Act." This is abundantly shown in the Commission's main report (R. 18–32) wherein it reviews numerous cases arising upon complaints filed with it by shippers, including some of the appellees in the cases at bar, who claimed allowances under Section 15 (13). Also, it is plain that payments under the guise of an "allowance" for a service which is not in fact a transportation service might, as in *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 510–511, 513, "amount to rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act", and, thus, *ipso facto* unlawful and a proper matter for a cease and

desist order by the Commission, regardless of whether they resulted in undue prejudice or unjust discrimination.

And it is more apparent that such payments might, as here, be plain "refunds" of a portion of the tariff rates, which Section 6 (7) expressly prohibits regardless of the effect upon shippers who do not receive such payments.

The holding of the court below that the Commission is "without power to prohibit entirely allowances for doing 'spotting service'" denies power in the Commission to question whether allowances are *ipso facto* unlawful, whether they are paid under that guise for any transportation service at all, or whether a service rendered by a shipper is in fact a transportation service. Thus, the lower court opens wide to simple rebating the very door which the Act was designed to close.

The Court's holding is in the very teeth of this Court's decision in the *Merchants Warehouse Case, supra;* and it is also directly contrary to decisions of other courts and to the Commission's consistent interpretation of its power to make orders concerning allowances. Both the courts and the Commission have held that the provisions of Section 15 (13) itself gives the Commission power to determine not only what is a just and reasonable allowance but also whether under the facts of a particular case the payment of *any* allowance is lawful.

In *United States Cast Iron etc. Co.* v. *Director General*, 57 I. C. C. 677, a complaint under Section 15 (13), the Commission was asked by shipper to fix a reasonable allowance for spotting service, and the Commission said (pp. 683–684):

> * * * However, it is not satisfactorily established that the legal obligation of the defendant [railroad] goes to the extent of requiring it to spot the cars at the places of unloading or to take the cars from the places of loading within the plant. * * * Complainant's case is presented on the theory that the sole issue is the adequacy of the allowance voluntarily made by the defendant to cover the cost of the interchange switching and spotting service performed by complainant with its own power. But, as above shown, *the determination of that issue necessarily involves the question of whether the service for which the increased allowance is sought can fairly be regarded as a service substituted for the terminal service which the defendant is obligated to perform.* * * * [Emphasis ours.]

In *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (5th C. C. A.) (certiorari denied, 255 U. S. 574), a shipper sued a railroad for an allowance for switching services which it is claimed to have rendered pursuant to an agreement with the railroad. It had formerly made complaint to the Commission under Section 15 (13), and the Commission, after hearing, had dismissed the complaint upon the ground that it did not appear that the

railroad was under any obligation to perform the switching service involved. (See 48 I. C. C. 705–6.) The Court of Appeals said (p. 936):

> We are of opinion that the action of the Commission in dismissing that application amounted to a *ruling against* the asserted *right of the appellant to be compensated by the appellee for the services in question.* It is to be supposed that the Commission considered all the facts disclosed, including the agreement, if it was regarded as still in existence, and concluded that under all the circumstances appellant was not entitled to favorable action on its application. *The relief sought in this case could not be granted without denying effect to the action of the Commission in respect of a matter within its jurisdiction.* The legislative purpose in empowering the Commission to pass on charges and allowances for services of a shipper, or for his furnishing instrumentalities used in connection with transportation, including a review of agreements on those subjects, and to determine what, if any, allowance might be made therefor, would be defeated by recognizing a right of the courts to enforce such agreements, notwithstanding unfavorable action thereon by the Commission. [Emphasis ours.]

See also *Southern Cotton Oil Co.* v. *Central of Georgia Ry. Co.*, 228 Fed. 335–6.

The opinion of this Court in the *Los Angeles Switching Case* twice mentioned, with plain ap-

proval, the decisions in the *General Electric* and *Solvay Process cases* (14 I. C. C. 237, 246) in which the Commission had held that the spotting of cars by the plant railways of those companies was no part of the railroads obligations under the line-haul rate and had refused to approve allowances. The same general subject matter was later passed upon by the New York Court of Appeals in the *General Electric Case* (*supra*) 114 N. E. 115 (certiorari denied 243 U. S. 636), which decision has already been referred to and quoted from. Certain other portions of that decision are particularly pertinent here. At page 117 the opinion reads:

> Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. But whatever is essential in order to complete delivery the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; United States v. B. & O. R. R. Co., 231 U. S. 274, 293; 34 Sup. Ct. 75, 58 L. Ed. 218. *But no allowance is due for service rendered by the consignee after delivery has been made and transportation is at an end. An allowance in such cir-*

> *cumstances would constitute an unlawful rebate.* That is true of interstate shipments under the laws of Congress. Act to Regulate Commerce (Feb. 4, 1887) 24 Stat. L. 379; secs. 2, 3, 17; Act of Feb. 19, 1903, 32 Stat. L. 847; Act of June 29, 1906, 34 Stat. L. 584. It is true of intrastate shipments under the laws of New York. Public Service Commissions Law (Laws 1907, c. 429) secs. 31, 32. [Italics supplied.]

And later the opinion reads (p. 119):

> We are asked in the opinion of the Appellate Division whether it can be "the policy of the nation to prevent the most economical production of manufactured goods or to compel the defendant to cart its vast shipments from cars placed upon the plaintiff's own side tracks remote from defendant's works." The assumed alternative is an unreal one. The question is not whether switching within the plant shall cease. The question is, who shall pay for it? To compel the plaintiff to pay by deducton from the regular rates for any service not a part of transportation is to prefer the defendant over others. Armour Packing Co. v. U. S., 209 U. S. 56, 72, 28 Sup. Ct. 428, 52 L. Ed. 681. It is not the policy of the nation to place useless clogs upon commerce, but it *is* the policy of the nation that preferences shall be impossible.

In *Chicago & Alton Ry.* v. *United States,* (C. C. A., 7th Cir.) 156 Fed. 558, payments to an industry for use of its plant tracks in getting the industry's

freight out to the railroad (560) was held, not to be an allowance (561), but a departure from the rates, or a rebate under the Elkins Act. The fact that the case was a criminal prosecution certainly does not take from the force of the decision, and there is much in the opinion of interest here. Among other things the court said, p. 562:

> * * * Both acts were aimed to kill favoritism, and the favoritism in the Wight Case was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common-law pact between the railroads and the people. But it was not until the government as *parens patriae* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

It is clear that the regulatory scheme of the Act, particularly as protecting the general run of shippers under the rates, has its very foundation in the provisions of Section 6, requiring the publication and strict observance of tariffs, these same requirements being supplemented by the Elkins Act and its provisions for prosecutions against shippers as well as carriers. Section 6 prohibits transportation of

property or persons without tariffs published and on file; prohibits the collection or receiving of "a greater or less or different compensation" than that published in the tariffs; and prohibits the refunding of any portion of the rates "in any manner or by any device." The broad and comprehensive requirements and prohibitions of Section 6, and those of the Elkins Act, concerning the publication of tariffs and the strict observance thereof demonstrate beyond doubt that the tariffs are for service, and at rates, to be open to all alike. This, being the very crux of the regulatory scheme, leaves no room for departures from published tariffs (either in respect of the rate or in respect of the service for which the rate pays) in any manner or by any device whatsoever. *Southern Ry.* v. *Reid,* 222 U. S. 424, 442; *Chi. & Alton* v. *Kirby,* 225 U. S. 155, 165; *L. & N. R. R.* v. *Mottley,* 219 U. S. 467; *C. & O. Ry.* v. *Westinghouse, Church, Kerr & Co.,* 270 U. S. 260.

Prior decisions of the Commission and of the courts are so thoroughly dealt with in the main report (R. 18–32) that very little further reference to them seems necessary. As there said (R. 23), most of the Commission cases "did not go to the merits of the allowances, as such, but were founded upon" unjust discrimination resulting from a carrier's refusal to grant an allowance to one industry while doing so for a rival, or rivals, similarly situated. The Commission's orders in those cases (its

so-called alternative orders) required the carrier to desist from the unjust discrimination; that is they left an election whether to desist from giving the preference to the rival industry, or to grant the allowances (or accord "spotting") to the complainant industry. And generally such orders were complied with by granting allowances to the complainant. It will be seen that this would be particularly true where the defendant carrier met with competition from other carriers at the preferred industry, or industries. Insofar as appellees are suggesting that these alternative orders are administrative precedents, the most they can urge is that the Commission did not broaden those proceedings on its own motion and, in fact, then undertake what it has undertaken in this proceeding.

As further stated in the Commission's main report Commission cases dealing with the merits have been consistent; and the discussion in the report shows this. Appellees point to the *Car Spotting Case*, 34 I. C. C. 609, apparently as contrary to, or inconsistent with the many other determinations. But that case involved a suspension proceeding with respect to proposed tariffs of charges for all manner of deliveries, including spur and direct one-placement plant deliveries—an entirely arbitrary selection, for which reason the tariffs were cancelled without prejudice to the filing of others. (R. 25) Aside from this, two things in that decision dispose of appellees' contentions: In the Com-

mission's main report in this proceeding (R. 25), speaking of the *Car Spotting Case,* it said:

> * * * On page 616 we referred to our finding in the *Los Angeles Switching Case, supra,* that where the service was merely a substitute for team-track receipt and delivery the line-haul rate covered the service, for the reason that rates generally in this country had been constructed upon that basis. * * *

On the succeeding page (R. 26) a quotation is given from the *Car Spotting Case,* emphasizing:

> * * * The line-haul rate, however, covers only one placement of the car for loading or unloading and an additional charge should be made for each additional placement of the car for that purpose.

As further noted in the main report (R. 26) the *Second Industrial Railways Case,* 34 I. C. C. 596, immediately precedes the *Car Spotting Case* "in the bound volume." The quotation from that case reads:

> * * * The sixth group is composed of industrial plant tracks which are neither owned nor operated by common carriers and are not dedicated to public use, the ownership and right of use being in the controlling industries which operate them. They ask that allowances be paid them out of the locality basis of rates under section 15 of the act, upon the theory that they are performing a service of transportation which the

> trunk line is obligated to perform under the rate structure. This question was considered in the *General Electric Co.* and *Solvay Process Co. cases, supra,* and it is not necessary to enlarge upon it here. * * *.

In its final discussion of the *Car Spotting Case,* the main report (R. 31) refers to the fact that in *Chesapeake & Ohio Ry.* v. *Westinghouse-Kerr & Co.,* 270 U. S. 260, this Court compared

> * * * the service covered by the C. & O. tariff, with that considered in *Car Spotting Charges, supra,* and in *Downey Ship Building Corp.* v. *S. I. R. Ty. Co.,* 60 I. C. C. 543. In the *Downey case,* division 2 at page 547 defined the carrier's obligation as involving "only one placement of a car and the movement to be made without interference and over the trackage suitable for the service."

As bearing out what is further stated in the main report (R. 31) with respect to that decision of this court, the decision of the Supreme Court of Appeals of Virginia, 138 Va. 647, 123 S. E. 352, affirmed by this Court, clearly shows that the "spotting" there involved was direct movements of cars from the carrier's yard to the unloading points on the construction company's side tracks (123 S. E. at p. 353) and as stated by the railroad's witness (p. 354) the consignee was entitled to one placement of the car.

Reverting to the decision in the *General Electric Case, supra,* its most significant statement is that

no allowance (or additional service) is due "after delivery has been made and transportation is at an end." Under conditions obtaining at the plant of the General Electric, the "spotting" of cars at actual unloading points could only be done, if the business of the carrier was subordinated to that of the industry and, by reason thereof, the decision holds that the delivery, terminating the transportation, was an accomplished thing when the cars were placed on the storage tracks. The conclusions of the Commission in the instant cases embody this principle. They are conclusions, based on operating conditions and circumstances particularly within the administrative field and knowledge and as such, are entitled to the usual weight accorded to administrative judgment. *Private Car Case,* 282 U. S. 740, 758; *Warehouse Co.* v. *U. S.,* 283 U. S. 401, 508; *Standard Oil Co.* v. *U. S.,* 283 U. S. 235, 240; *Erie R. Co.* v. *U. S.,* 280 U. S. 98, 100, 102.

The main determination by the Commission in the present cases is that the carriers had complied with their transportation obligations under the line-haul rate by delivery on the interchange tracks and the service beyond was plant service. From this it necessarily followed that there was no consideration to support an allowance out of the rates. This main determination is not unlike the main determination in the *Private Car Case,* 155 I. C. C. 775, which this Court upheld in *L. & N. R. R. Co.* v.

U. S., 282 U. S. 740. The question in that case was whether the carriers' practice of carrying free the office cars of other carriers was not illegal and unjustly discriminatory, and, principally involved therein, was the carriers' contention that the carrying of such cars, occupied by persons holding passes, was not "transportation of property" within the meaning of the Act but was merely the moving of a vehicle of transportation. As to this the Court said, pp. 757, 758:

> There is no ambiguity in the requirement of section 6 (1) of the Act that its provisions as to published tariffs "shall apply to all traffic, transportation, and facilities defined in this Act." Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute.

The Commission's order in the *Private Car Case* was that the carriers desist from carrying free the office cars of other railroads. It could not be an alternative order merely requiring the carriers to desist from unjust discrimination because the office cars being "property transported" were subject to section 6. (See headnote 5 and the Commission's findings.)

Also the Commission's main determination in *Warehouse Co.* v. *U. S.*, 283 U. S. 501, is very like that in the present cases. That determination was that the Merchants warehouse was not a public freight station—an agency of the railroads—and its designation as such in the tariffs was purely nominal, the real purpose being to compensate the warehouse by allowances, for soliciting freight for the railroads. It found (160 I. C. C. 563, 566–569) that "the weight of the evidence" supported the contention, among others, of the complainants "that the loading and unloading of freight by the contract warehouses is not in fact transportation service and that allowances therefor, being for trade services, are illegal", and that "the record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses.' And, although it found further that payment of the allowances resulted in unjust discrimination and undue prejudice against the complainants, its order directed only, as pointed out by this court (p. 504), that the railroad "cease and desist from making allowances." In sustaining the order this court, after holding that the evidence justified the finding that the warehouses were not public freight stations, said the remaining questions were (1) "whether the services for which the allowances are made are transportation services for which the carriers may lawfully com-

pensate", and (2) "if they are, whether the carriers may discriminate by granting such compensation to appellants and not to others." Concluding its discussion of the evidence relating to the first question, the court said (pp. 510–511):

> Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act.

The court went on to say, in addition, that payment of the allowances also unjustly discriminated against the complainants. But, it then made the following statement (p. 153), to which this Court's attention is particularly called:

> For reasons already indicated, the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending the benefit of the allowances to the competing warehouses. Since the allowances are for services which include the assembling and distribution of carloads from or into less than carload lots, the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs and classifications for the handling of carloads.
>
> * * *

In a recent decision involving suit for damages under the anti-trust laws on the same facts, *Terminal Warehouse Co.* v *P. R. R. et al.*, 297 U. S. 500, the court said:

> * * * The assumption was that the warehouses, though not owned by Pennsylvania, were, none the less, public freight stations supplied by a contractor (*United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, 288), and that the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent. * * * Those cases stood unquestioned until 1928, when one of them (*McCormick Warehouse Co.* v. *Pennsylvania R. Co., supra*) was reheard and overruled (148 I. C. C. 299), earlier decisions to the same effect falling along with it. The conclusion was then announced that a warehouse company doing business under such a contract was a consignor or consignee, acting on its own behalf and not as agent for the carrier. With this change in its relation discriminatory payments or allowances became forbidden and unlawful. 49 U. S. C., sec. 3 (1).

And later the decision reads:

> * * * By rule of the Consolidated Freight Classification a carrier may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. 283 U. S. at p. 510. Thus the opinion makes it clear that the whole system

> of warehouse stations, with its payments and allowances, including the incidental saving of demurrage, had been built upon a false foundation. Adherence to the statute called for its suppression. * * *

Reverting, then, to the case at hand: With the delivery completed and transportation ended by placement of the cars on the hold tracks, the conclusion must follow that the subsequent plant spotting of cars is not part of the interstate transportation that has been already ended by delivery already completed and that accordingly no allowance is due or can be lawfully paid to plaintiff industries.

The tariffs referred to in section 6 are not tariffs for particular shippers (*C. & A.* v. *Kirby, supra; C. & O.* v. *Westinghouse etc. Co.*, 270 U. S. 260, 266), and the allowances referred to in section 15 (13) are not for service rendered by a shipper, which, if performed by the carrier, would violate the Act. In *Merchants Warehouse Co.* v. *United States, supra,* it was said at pp. 511–512:

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Comm.*, 282 U. S. 740. In that case we held that a carrier may not haul private cars of some of its passengers free of charge and deny the privi-

> lege to others on the theory that it is using the cars which it carries free, as instrumentalities of transportation. The very selection of the cars of some passengers and not others for the favored treatment was held to be a forbidden discrimination. The order of the Commission upheld there would be futile if discrimination could still be effected by filing an exception to the carrier's tariffs for hauling private cars, designating some private cars as transportation facilities, and then granting allowances to the owners for their use. That, in substance, and practical operation, is the effect of tariff exceptions and the allowances which the present order forbids.

For the proposition that publication in tariff form can not legalize unlawful refunds and discriminations see also *Interstate Commerce Commission* v. *B. & O. R. Co.*, 225 U. S. 326, 345; *C. & A. Ry.* v. *U. S.*, 156 Fed. 558; 560; *C. R. Co. of N. J.* v. *U. S.*, 229 Fed. 501, 507–509; *Gallagher* v. *P. R. R.*, 160 I. C. C. 563, 568. Regardless of publication in tariffs, allowances are "lawful only when supported by a consideration. To pay shippers for doing their own work" is "a mere gratuity," *Mitchell Coal Co.* v. *P. R. R. Co.*, 230 U. S. 247, 263.

3. The findings made by the Commission in each case are sufficient to support the respective order

The contention made by appellees that the Commission did not make the requisite specific findings

in the present cases does not deny that in each supplemental report the Commission has found and recited all pertinent basic facts concerning the physical location and arrangement of each of the plants, of the plant tracks, of the interchange and other tracks of the carriers, and of the "actual conditions of operation" (*Los Angeles Switching Case*, 234 U. S. 294, 311), and all pertinent circumstances relating to the physical movement of the cars. Nor do appellees deny that from the basic facts thus found, the Commission, in each case, made the ultimate essential finding and conclusion that the spotting of cars within the plants of the respective appellees is not a service which the carriers are required or permitted to perform or pay for under their line-haul tariff rates. The contention, therefore, really is that, in addition to the full basic findings and ultimate conclusions made, the Commission was required to make the further finding that not only was the payment of any allowance at all unlawful, but that it was unduly preferential. It is a further application of the same contention which we have answered in discussing, under the last point, the Commission's power to make the orders. That discussion need not be repeated here, but is respectfully referred to.

The only requirement in the Act having any bearing on the matter of findings is the provision of section 14 which states that it shall be the Commission's duty, after an investigation has been

made, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Thus the only "findings of fact" required by the statute itself is in cases in which the Commission awards damages—a subject which is not before the court in any of these cases. In *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, this Court, in sustaining an order of the Commission which required carriers to cancel a tarff upon a finding that division or switching absorption paid by the carriers was so large as to amount to a preference or indirect rebate, said (pp. 487, 489–490):

> In orders of this kind, not including an award of damages, formal and precise findings no longer are necessary; section 14 having been amended in this respect by Act of June 29, 1906, c. 3591, 34 Stat. 584, 589.

In *United States* v. *Louisiana*, 290 U. S. 70, the Court said: "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 490." In *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, in sustaining an order of the Commission, the Court said (pp. 286–287): "The findings in the report being thus accepted as true, there is left only

the inquiry whether they give support to the conclusion. * * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Of particular significance in the instant cases is the decision of this Court in *A. T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which the Court held that the Commission's order, involving yardage charges for services in the Union Stockyards, could not be sustained because the Commission had "made no definite finding as to what constitutes complete delivery or where transportation ends." The finding which the Commission failed to make in that case is the precise and fundamental finding made by it in each of the supplemental reports in these cases, for in each case it finds that transportation ends or begins at the interchange tracks.

In *Koppers Gas & Coke Co.* v. *United States*, 11 F. Supp. 467, the sufficiency of the Commission's findings, which were identical to those in the cases at bar, was challenged, and the court held (p. 469):

> It would seem that the main essential ultimate basic fact to sustain the order of the Commission in this case is that the transportation service terminated at the gateway of the petitioner's plant. If that finding of the Commission is sustained by the evidence, then it would follow that the allowances provided for in the tariffs were gratuities paid to the shipper, and clearly preferential.

Identical findings were also held sufficient by a three-judge court for the Northern District of Indiana in *Elgin, Joliet & Eastern Ry Co.* v. *United States*, and *East Chicago Dock Terminal Co.* v. *United States*, decided January 23, 1937, not yet reported.

We submit that the findings contained in each of the supplemental reports (Appendix B to each petition, R. 49, R. 66, R. 83, R. 100, R. 116, R. 129) fully meet the requirements of the statute and of the decisions just mentioned. Not only has the Commission made the necessary ultimate finding or conclusion of fact in each report, but it also has set forth and found all necessary and pertinent basic facts. Since neither the statute nor the decisions of the courts require any particular form or statement of findings of fact, the findings in the cases at bar are clearly adequate. Each fact stated and found in the report necessarily is a "finding" of that fact, without being labelled as such by the Commission. The findings in each report clearly furnish a "rational basis" for the order which rests upon them. (*Mississippi Valley Barge Co.* v. *United States, supra*, p. 287.)

The circumstances presented in the cases upon which appellees rely for support of the claimed insufficiency of the findings in the instant cases are clearly distinguishable. The reports in each of the cases at bar supply and contain the essential findings which the court held in those decisions to be

lacking. Thus, to illustrate by mentioning one of the cases relied upon in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, the Commission had power, under the statute there invoked, to require changes in the reversing gear of locomotives upon finding as a fact that the change was required to remove "unnecessary peril to life or limb." That finding was held to be essential to the issuance of an order, and inasmuch as the Commission had not made the required finding the order was enjoined. In other words, the Commission omitted the very finding of fact which was necessary to enable the court to determine whether there was the prerequisite factual basis for the order.

4. The orders are supported by substantial evidence

It is important, before discussing the sufficiency of the evidence, to observe the nature of the contention that the orders are not supported by the evidence. All the petitions make similar allegations concerning the lack of evidence, and reference to one will suffice for the present purpose. Taking the allegations of Allegheny Steel Company's petition as illustrative (R. 53), it will be noted (R. 61–62, section XII, 4–6) that it is not alleged that the basic facts found and stated in the Commission's report (showing the physical arrangement of the plants, the plant facility tracks, the location and arrangement of the interchange tracks and the spurs of the trunk lines leading thereto, and the circumstances and conditions

under which the physical movement of the cars between the interchange tracks and points within the plant are performed, including plaintiffs' requirements for "on call" spotting service) are without support of evidence, or that the facts stated by the Commission are not proved by the evidence. It is merely alleged that there was no evidence upon which the Commission could find that the railroads have complied with their *obligation* under their line-haul rates by placing cars on the interchange tracks or removing them therefrom; or that the movement of cars beyond the interchange tracks and within the plant is a plant service; or that payment of an allowance to the plaintiffs provides the means by which they enjoy a *preferential service* not accorded shippers generally; or that payment of allowances for the spotting service *violates section 6 (7)* of the Act. Further allegations are that the *evidence affirmatively proves* that the spotting of cars is a *transportation service* which the railroads are bound to furnish or pay for; and that the evidence *fails to* show any violation of law by the plaintiffs or the railroads in connection with the plant spotting or allowances therefor. These are the only particulars in which the petitions challenge the sufficiency of evidence to support the orders. But the allegations plainly fail to allege that there is insufficient evidence of the physical facts and actual conditions of the operation involved in the performance of the spotting service.

Appellees' argument in the court below demonstrated that their real contention with respect to the sufficiency of the evidence is that the Commission should have accepted the individual views, conclusions and opinions of witnesses concerning the carriers' legal obligations under the line-haul tariffs, and concerning so-called "custom and usage", and should not have drawn its own conclusions from the undisputed physical facts showing the actual conditions of operation in performing the spotting service. The contention, therefore, resolves itself into a quarrel with the Commission concerning, not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from abundant and undisputed evidence which the record does contain. This type of attack upon the sufficiency of the evidence cannot prevail. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 100; *The Assigned Car Cases*, 274 U. S. 564, 580; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658.

The decision of this Court in *Merchants Warehouse Co.* v. *United States, supra*, p. 508, shows that whether a particular service is, in fact, a transportation service which the carriers must perform under or pay for out of their line-haul rates or is a trade service or plant service, is a question to be decided by the Commission upon evidence which discloses the physical character of the services and

the actual conditions and circumstances under which, and the purposes for which, the services are performed.

Similarly, in *Los Angeles Switching Case, supra,* (234 U. S. 294) the Court, after adverting to so-called "custom and usage" said (p. 311):

> But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined *according to the actual conditions of operation.* Such a question is manifestly one upon which it is the province of the Commission to pass. [Italics supplied.]

The presently important point made clear in that decision is that whether any such switching service constitutes a transportation service which the carriers are obliged to perform under their line-haul tariffs is a question which must be decided upon the physical facts and circumstances which disclose "the actual conditions of operation." The Court further said, at p. 311, that, if based upon evidence, it must take "as conclusions of fact" which "are not open to review", the Commission's findings

> as to the character and manner of use of the industrial spurs [as distinguished from in-

> traplant tracks] in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds.

The carefully considered opinion of the Court of Appeals of New York in *New York Central & H. R. R. Co.* v. *General Electric Co., supra* (114 N. E. 115, certiorari denied, 243 U. S. 636), also demonstrates that whether plant spotting of cars on plant tracks for loading and unloading is a part of the carriers' transportation duties under their line-haul tariffs, or, as the question is there stated, "Where does transportation begin and end?", is a question to be determined upon evidence disclosing the physical arrangement of the industry, of its plant tracks, the interchange or "hold" tracks of the carriers, and of the actual conditions and circumstances of the physical movement of the cars, including the fact as to whether the physical movement takes place at the discretion and convenience of the carriers or at the direction and under the "jurisdiction" of the industry. Again, in *L. & N. R. R. Co.* v. *U. S.*, 282 U. S. 740, at pp. 757–758, the Court said that whether private cars of other carriers are to be deemed property transported or a facility of the carrying line "depends upon the circumstances of the carriage as matters

of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape" from the statute. To the same effect is the decision in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, in which the court held that the services of gathering and soliciting traffic and combining it into carloads for transportation over the railroad, although "in a practical sense" connected with such transportation, were not services "connected with it as a necessary part of the carriage—were not 'transportation service' * * * and in our opinion were not such services as were contemplated in the Act", (Section 15(13)). The rule of these cases and the character of the evidence upon which they were decided should be kept in mind in considering the discussion of evidence now to be presented in each of the separate cases before the Court.

AMERICAN SHEET & TIN PLATE CO. v. UNITED STATES

The bill of complaint in this case (R. 1) seeks to enjoin and annul the Commission's order of July 5, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying allowances of $1.10 per loaded car to the appellee for performance of "spotting service" within its industrial plants at Vandergrift, Pa., and Wellesville, Ohio, and that the Pennsylvania Railroad Company and the Baltimore & Ohio Railroad Company cease and desist from paying allowances of $1.14 to appellee

for performing such spotting service within its plant at Scottdale, Pa. (Report, R. 49, Order, R. 51.)[9]

The spotting service performed by appellee consists of moving with its own locomotives and crews loaded and empty cars between interchange tracks at the entrance to appellee's plants and points within the plants at which the cars are unloaded or loaded.

Appellee's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks, and main line of the railroads are shown in detail on a blueprint or map produced in evidence as Exhibit C–164 (Special Exhibits). Witness Cramer, in charge of appellee's Transportation Division, gave a detailed description of the physical facts just mentioned (R. 231–236), and described the physical circumstances and conditions under which appellee performs the spotting service. Appellee's Vandergrift plant has been in operation more than thirty years, manufacturing steel by open hearth and rolling process.

[9] At the hearings before the Commission, appellee, with the consent of the Commission's counsel and examiner, selected the spotting services at its Vandergrift plant as typical of those performed at the three plants just mentioned. (Or. Tr. 10444–5.) Pursuant to this agreement, the Commission's findings and order relate to and include the three plants.

It and the Wellsville plant are served by the Pennsylvania exclusively, while the Scottdale plant is served by the Pennsylvania and the Baltimore & Ohio. The interchange tracks at which the carrier delivers and receives cars to and from appellee at the Vandergrift plant is located at the west end of the plant. Within the plant there are 5 loading and 15 unloading points where freight cars are spotted (R. 236), and there are 8 miles of plant track consisting of two main tracks with which 20 or 25 additional plant tracks connect. These tracks are all owned and operated by appellee. In performing the spotting service between the interchange tracks and these loading and unloading points, appellee moves the cars a maximum of 5,400 feet, a minimum of 800 feet, and an average of 2,500 feet. During the year 1930, taken as a typical year, plaintiff handled inbound, 5,783 cars, and outbound, 6,181 cars, in this spotting service. (R. 232–233.) Appellee owns 4 switching locomotives, 3 of which are in constant use over a 24-hour period in performing spotting service and intra-plant switching (R. 235). The nature of the spotting service at the Vandergrift plant has not changed since 1915 (R. 233), and appellee has always performed this service and has never requested the railroad to perform it (R. 232–233). Appellee received no allowance for the service between the time the plant began operating in 1902 and the time when the allowance was first made in 1917 (R. 233).

Weighing of outbound traffic is required by appellee for its industrial purposes and the weights are used by the railroads for billing purposes. (R. 234.) A considerable amount of inbound traffic, including scrap, pig iron and limestone, is weighed by appellee to ascertain whether the freight charge is being assessed on the correct weight, and whether "we are actually getting what we are paying for." (R. 234.) The weighing necessitates moving inbound cars from the interchange tracks to the scales, and, after weighing, then to the final point of placement. Weighing of outbound cars requires the same movement, but in reverse. The scales are located between the interchange tracks and the loading and unloading points (R. 234). Thus, as stated by the Commission, the railroads could not perform the spotting service "in one uninterrupted movement at its ordinary operating convenience," because appellee requires that the cars be weighed. (R. 50.)

Plant requirements, convenience and interference.—The operation of appellee's plant requires continuous spotting service, and if the railroads undertook to perform the service, their locomotives would have to be assigned for continuous service at the plant (R. 237), though they might be busy all the time. When the railroad delivers a string of cars on the interchange tracks, appellee immediately spots the car "if we have immediate need for them," but if they are not required immedi-

ately the cars are moved from the interchange tracks "in the regular course of our spotting and work." (R. 233–234.) Ordinarily, appellee moves cars delivered to it on the interchange tracks in as few trips as efficient operation permits, but when particular carloads of material are required in the plant operation, it immediately spots "such cars as are immediately needed," leaving others on the interchange track (R. 234). The witness stated that plaintiff was willing to permit the railroad to perform the spotting service (R. 233), but that, if the railroad undertook to perform the service, it "would be required to place the cars after their arrival at Vandergrift as needed" (R. 234), and that would require assignment of a locomotive to the plant, which the witness said "could be arranged to conform to our needs" (R. 234). He stated that he did not think there would be any interference between the railroad and the plant operations if the railroad undertook to perform the spotting service (R. 234), but that it would require "cooperation between the two sides." (R. 236.)

Witness Cramer further testified with respect to spotting service at appellee's plants located at Farrell, New Castle and Monessen, at which the railroads themselves perform the spotting service (R. 240). He stated (R. 241) that at those plants the railroads perform the spotting service "only as ordered by the industry"; that "the railroads

wouldn't place any which we didn't ask them to place," and that the railroads hold the cars on their own tracks until ordered by appellee to bring them into the plant, saying, "We order down what we require and what we need."

Witness Dixon, an employee of the Pennsylvania Railroad, stated that "the power that we have located at Vandergrift, or in that vicinity rather, would not negotiate all the curves in the plant of the American Sheet & Tin Plate Company at that place", and that after the railroad has delivered cars on the interchange track the cars "are taken in by the mill shifters as needed, and in a great many instances, cars are left on interchange tracks that they do not need at that time", and further that there are "always cars on the interchange tracks, either loaded or empty" (R. 238).

Witness Kulp, of the Pennsylvania Railroad, stated that the carrier could not operate over the Scottdale plant tracks with its engines assigned to that vicinity, and that "if the Pennsylvania undertook to perform that service, it would require bringing in to the plant a particular type of engine not in common use in that general district, an engine of smaller type * * * that could negotiate all the tracks" (R. 237).

Custom and usage.—The history of the spotting service performed by appellee at its Vandergrift plant demonstrates the error of the assertion that there is a general custom of carriers to spot cars

at points within industrial plants as part of their line-haul transportation duty, or to pay industries for performing the service. Here, it is shown that the railroad has never performed the service for appellee although the plant has been in operation thirty-five years (since 1902), and that it was not until 1917 that the railroad paid appellee an allowance for performing the service. Moreover, payment of the allowance was not because of any change in either the line-haul rates, so far as the record shows, or of any change in the nature of the service performed, for Witness Cramer said that there had been no substantial change in the nature of the service since January 1, 1915 (R. 233).

ALLEGHENY STEEL CO. v. UNITED STATES

The petition in this case seeks to enjoin and annul the Commission's order of June 7, 1935, requiring the Pennsylvania Railroad to cease and desist from paying an allowance of $1.07 per loaded car for switching or "spotting" cars within its plant at Brackenridge, Pa. (Report, R. 66; Order, R. 69).

Appellee manufactures steel and alloy products and various kinds of railroad supplies. For many years the Pennsylvania has delivered to and received from appellee loaded and empty cars upon designated interchange tracks at appellee's plant. The spotting for which appellee receives the allowance consists of the movement of cars with its locomotives between the interchange tracks and par-

ticular points or "spots" within the plant where appellee requires the cars to be placed for loading or unloading. The cars are moved from and to the interchange tracks throughout each 24-hour period as and when the appellee's manufacturing processes require the contents of the inbound loaded cars and the movement of finished products to make room for the continuous outturn of the plant.

Appellee's plant and its physical arrangement, location and type of buildings, location and number of plant tracks, and the location and arrangement of the interchange tracks, the spur tracks and main line of the railroad, are all shown in detail in Ex. C–147 (Special Exhibits). Witness Carr, Taylor and Mimm submitted (R. 199, 200 and 201 respectively) a description of the physical facts just mentioned. Their testimony shows, and the Commission's report states (R. 66), that the plant covers approximately 100 acres of ground, of which 75 acres are occupied by the plant buildings and structures. (R. 199.) Within the plant there are 150 industrial tracks and sidings totaling 10 miles in length. The cars are spotted at 10 important loading and unloading points, and at 3 scrap yards, and at 5 or more locations at which the cars are loaded and unloaded by aid of locomotive cranes. (R. 200–201.) As will be seen from Ex. C–147, this large industrial plant has a great number of separate buildings and manufacturing units, and a

complex and intricate net-work of plant tracks used in carrying raw materials from one to another unit in the manufacturing process. It is bounded on the north by the main line of the Pennsylvania and on the south by the Allegheny River, facilities for both rail and water transportation being available. (R. 200.) About 80 inbound cars are handled at this plant daily (R. 201), but the record does not show the number of outbound cars. As long ago as 1919, appellee handled annually within this plant as many as 25,000 cars, containing raw materials inbound and finished products and waste material outbound. (R. 200.) All of the plant tracks from the interchange tracks into and throughout the plant are owned by plaintiff. (R. 200).

Appellee owns and operates within the plant 7 switching locomotives, of which 5 are normally in active use (R. 201). During one-third of the average 24-hour period these locomotives are engaged in "spotting" or moving cars to and from the interchange tracks. During the other 16 hours they are used in intraplant switching, that is, moving cars from one manufacturing unit to another within the plant. (R. 201.) The spotting service, however, is not done in 8 consecutive hours but is performed throughout the 24-hour period. (R. 203.)

Weighing of all inbound carload shipments is required by appellee for which purpose the "spot-

ting" movement from the interchange track to the unloading point is interrupted. The cars "are first taken from the interchange track, weighed on the scale, and then spotted for loading and unloading." (R. 201.) Those weights are taken for appellee's purposes, and not at the request of the Pennsylvania, but the latter uses them for shipping weights. (R. 201–204.) Appellee also requires weighing of its outbound traffic "both light and gross", and the Pennsylvania also uses those weights for billing purposes. (R. 201.) From this testimony the Commission properly concluded that if the railroad undertook to perform the spotting service, the plaintiff's requirement that all cars be weighed for industrial purposes would necessarily prevent the railroad from moving the cars in one "uninterrupted movement at its ordinary operating convenience" between the interchange tracks and the loading and unloading points. (R. 68.)

Plant requirements, convenience and interference.—Cars are moved to and from interchange tracks "as a particular plant unit requires them" (R. 201).

That the convenience of appellee in its manufacturing processes and not the convenience of the railroad must be served in performing the spotting service is established beyond doubt by the testimony of appellee's Witness Carr (R. 202–203). He said that appellee would be willing to permit the railroad to perform the service "if they do it

as expeditiously and as efficiently as we do it ourselves", which he explained by saying "if you have to wait two or three hours to get a car at the point where you want it from one service, and you can get it in twenty minutes from another service, the quicker service is the one that we require and we desire." He further said "I would certainly want it [the cars] spotted when we wanted it and as we wanted it spotted", and that "the convenience of the trunk line from my standpoint is not the convenience of the consignee or the shipper. What might suit the railroad's convenience might entirely delay the operation of our plant and also delay the production of finished material for shipment over the railroad * * *" (R. 202). His testimony conclusively shows that if the railroad undertook to perform the service it would have to do so entirely under appellee's "jurisdiction." He said (R. 202-203) it would be satisfactory to appellee for the railroad to perform the service if it assigned its locomotives to the plant and if "the movement of these locomotives and their work for the entire time that they are there is subject to the plants' orders." In the *General Electric Case, supra,* the Court held, p. 118, that "reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant," or "to subordinate the operation of the business of the carrier to the needs, the economies, the internal administration of the business of the shipper."

Witness Dixon, an employee of the Pennsylvania, testified (R. 203) that "the power that the Pennsylvania has in this vicinity could not do the spotting at this plant because it is too large to take the curves." He said that if the Pennsylvania undertook to perform the service it "would have to furnish power suitable to negotiate this industry's tracks", which would have to work under the jurisdiction of the plant yardmaster under his orders, of course, because we wouldn't know what requirements he would have. (R. 203.) He further said that if the railroad brought in smaller locomotives that could negotiate appellees plant tracks "they would not be of any other use on this division" (R. 204).

Custom and usage.—Concerning appellee's assertion of an established custom of the carriers in placing cars at loading and unloading points as part of the service required under their line-haul rates: Witness Carr testified that for 29 years before obtaining an allowance, appellee performed the spotting service at its own expense, and that one of the reasons it asked for an allowance was that other iron and steel industries were being paid for similar services. (R. 202.) It is undisputed that during the entire existence of the plant to the present day the "custom" of the railroad at this plant has been, and now is, to deliver loaded cars and receive empty cars on the interchange tracks which have been designated and agreed

upon by the railroad and appellee for that purpose. The "custom" of the railroad at this plant for twenty-nine years was neither to perform the service nor to pay an allowance. Furthermore, as stated in the Commission's supplemental report (R. 67) and in Witness Carr's testimony (R. 202) the railroad refused consistently throughout the twenty-nine year period to concede any obligation to perform or pay for the spotting service. It did not pay any allowance until after the Commission found that by paying to others and refusing either to pay appellee or to perform the service, the railroad subjected appellee to unjust discrimination, and issued an order giving the railroad the alternative of either ceasing the payment of allowances to others or of paying them to plaintiff. In that case, however, the Commission expressly held that the evidence did not establish that it was unreasonable for the railroad to refuse either to pay an allowance or to perform the service as a part of its duties under the line-haul rates. (R. 67, and 60 I. C. C. 575.)

PITTSBURGH PLATE GLASS CO. v. UNITED STATES

The petition in this case (R. 70) seeks to annul the Commission's order of June 25, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of 65 cents per loaded car to appellee for performing plant spotting of cars within its plate glass plant at Ford City, Pa. (Report, R. 83; Order, R. 86.) In 1929,

appellee handled 6017 cars at this plant, in 1930 it handled 4043 cars, and in 1931 it handled 3396 cars. (R. 84.) About one-third of these cars were outbound and the balance contained inbound raw materials.

Plant arrangement, equipment and power.— Exhibit C–160 (Sp. Exs.) is a map or blueprint showing in detail the arrangement and location of buildings, plant tracks, spur tracks and their connection with the main line. This exhibit was explained by Witness Putnam, assistant superintendent of the plant (R. 214), who also pointed out the spots or locations at which cars are placed for unloading and loading. The plant contains 8 or 9 miles of industrial track connecting with the various buildings and units of the plant. Appellee has two locomotives operating in the plant, one of which is now in use about three hours each day (R. 215–216). These locomotives operate over all of the plant tracks in performing both the spotting service and intra-plant service between the different units. One of the plant tracks over which spotting service is performed has a curvature of 25 degrees, but other tracks used in this service can be negotiated by switching locomotives of the railroad (R. 216). There are numerous "spots" at which appellee requires cars to be placed for unloading, there being one or two for each of the operating units in the plant, and some 15 such points being detailed by the witness (R. 215–216).

Four "spots" for loading outbound cars were shown (R. 216).

Weighing.—All inbound freight is weighed for appellee's industrial purposes. On outbound freight, "the package weights are taken." Appellee's scales are located on the east side of the plant (R. 216).

Plant requirements, convenience and interference.—Appellee requires performance of interchange spotting 5 or 6 hours each day, and one locomotive could perform the service "if he was there at the proper hours", which would be designated by the industry. The spotting is required from 10 a. m. to 4 p. m. each day, and during that time appellee's own locomotives are performing intraplant switching (R. 216).

Witness Dixon, an employee of the Pennsylvania, knew of no physical obstacle within the plant to prevent the railroad from performing the service; but, he stated, that the Pennsylvania has no locomotive in that district which could negotiate appellee's industrial tracks and that to perform the service it would have to bring in from elsewhere and assign a locomotive to that plant exclusively, to cover the "spread period" of 5 or 6 hours during which appellee requires spotting. He thought, therefore, that it would be more economical for the Pennsylvania to pay the allowance than to perform the service. (R. 217.)

The result of an attempt by the Pennsylvania to perform the service at this plant is shown in a pre-

vious decision of the Commission and is referred to in the testimony (R. 217). The complaint, filed with the Commission in 1919, alleged that the Pennsylvania's refusal to perform the service or to pay appellee its cost of performing the service was unreasonable, unjustly discriminatory and unduly prejudicial, and prayed for an order requiring the Pennsylvania to pay appellee a reasonable allowance. The Commission's report, *Pittsburgh Plate Glass Co.* v. *Director General*, 58 I. C. C. 81, states, at p. 82:

> Prior to about 1903 the defendant carrier did the switching and spotting, together with a large proportion of the intermill work, without extra charge, but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own motive power. In December, 1906, complainant's representative made application verbally to the defendant carrier for an allowance to cover the cost of the service performed at the Ford City plant, which has been followed up in conferences from time to time, thus far without success. On the other hand, complainant has never asked the carrier to perform the service, but is willing that it should if performed efficiently and satisfactorily, not merely at the carrier's convenience, and it is urged that the service could not be efficiently performed by the carrier unless an engine was devoted exclusively to such service.

The Commission did not find that it was the Pennsylvania's legal duty to perform the service or to pay an allowance, but found upon the facts of record that the Pennsylvania's failure to do so was not shown to be unreasonable. It said (p. 84):

> In determining the reasonableness of the practice of the carrier the real issue is whether the service performed by complainant is one which ought to be done by the carrier as a substitute for delivery on its own tracks, or one reasonably contemplated at the line-haul rate. In this case no increased charges have been imposed upon the complainant by reason of a cancellation of former allowances or a discontinuance of a switching and spotting service by the trunk lines since January 1, 1910, nor has that line ever been called upon to perform the service in lieu of an allowance.

The Commission found, however, that the Pennsylvania's refusal to perform the service or to pay an allowance, while performing similar service or paying allowances therefor to appellee's competitors, resulted in undue prejudice to appellee, and issued an order giving the Pennsylvania the alternative of performing or paying the industry for the service, or of ceasing the performance of or payment of allowances to competitors.

Witness Glenn, an employee of the Pennsylvania, testified that the 65-cent allowance which was fixed and published in 1927 after the Commission's decision, was a "purely arbitrary" figure,

and represented one-third of the estimated cost to the railroad of performing the service (R. 217). He said that after the Commission's decision, the Pennsylvania undertook, on August 2, 1927, to perform the spotting service but quit on September 11, 1927, because "the service was so unsatisfactory that we agreed to pull out our power * * *. Evidently, the work inside the plant, our engine in there at the same time, caused an unsatisfactory arrangement." He also said that the arrangement was not satisfactory to the Pennsylvania (R. 217-218).

Appellee does not deny these facts nor does it claim that the evidence is insufficient to prove them. Indeed, it is in no position to deny that there is complete evidence of the physical arangement of the plant, the tracks, the nature of the service, and the actual conditions under which it must be performed, for the evidence of those facts was submitted by appellee's own witnesses.

The evidence clearly shows that the service must be performed at appellee's direction and not at the convenience of the railroad. It is obvious that the failure of the Pennsylvania's attempt to perform the service in 1927 was due to the impossibility of making any arangement which would meet appellee's industrial needs and, at the same time, serve the Pennsylvania's convenience. In other words, to perform the service at all, the Pennsylvania would be compelled "to subordinate" its

operation "to the needs, the economies" of the plant. *General Electric Case, supra.* The evidence further shows that inbound cars cannot be spotted in an uninterrupted movement for the reason that appellee requires that all such cars be first taken from the interchange tracks to the scales to be weighed for its industrial purposes. And the evidence further establishes that the Pennsylvania's locomotives which operate in that district cannot negotiate the industrial plant tracks, and that to perform the service itself the Pennsylvania would be compelled to obtain a suitable locomotive and assign it exclusively to performance of appellee's service. The evidence clearly furnishes ample support for the Commission's order. Upon evidence disclosing similar facts, the courts rested the decisions in the *General Electric Case, supra; Los Angeles Switching Case, supra;* and *Warehouse Co.* v. *United States, supra.*

"Custom and Usage."—This record does not show when the plant began operations but the Commission's earlier report, 58 I. C. C. 81, finds that it was operating before 1903. It states (p. 82) that prior to 1903 the Pennsylvania performed the switching "but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own motive power." It is plain that there has been no uniformity or "custom" in the performance of or payment for the service at this plant. The Pennsylvania performed the serv-

ice prior to 1903, but from that year to 1927 appellee performed it and received no allowance. The record shows no change in the line-haul rates when the Pennsylvania ceased performing the service in 1903 or when it began paying the allowance in 1927. These facts clearly negative the view that there has been any custom at all concerning the service at this plant. When the matter was before the Commission in 1920, the Pennsylvania defended the suit, thus showing that it recognized no legal obligation to perform the service, but during the litigation it offered to perform the service "if included within its legal duty, provided the service is performed without interference and the tracks are in such condition that its locomotives can operate over them" (p. 83). The effect of the Commission's decision in that case necessarily is that the service was not one which the Pennsylvania was under legal duty to perform under its line-haul rates, for it rejected appellee's contention that the Pennsylvania's refusal to perform or pay for the service was unreasonable. Thus the Commission has twice decided, upon facts which fully disclose the nature of the service and the conditions under which it is performed, that car spotting in this plant is not a service which the railroad is required to perform under its line-haul rates.

In this case (R. 87) appellee seeks to enjoin the Commission's order of June 24, 1935, which requires the Pennsylvania Railroad Company to cease and desist from performing spotting service for appellee at its plant at Weirton, W. Va., or paying an allowance therefor. (Report; R. 100; Order, R. 104.) At this plant the carrier itself performs the spotting service instead of paying an allowance, though in 1929 it published an allowance of $1.23, which appellee, however, has declined (R. 209). During a period of plant construction between 1919 and 1921, appellee performed the service at several of the separate units of the plant (R. 209).

Plant arrangement, equipment; and power.—The first unit of the plant was constructed in 1909. Witness Earp, appellee's traffic manager, introduced in evidence Exhibits C–153 and C–154, (Special Exhibits) the first of which shows the growth of the plant unit by unit, and the second of which is a map or blueprint showing the locations of the seven major units or departments of the plant, the location and arrangement of the Pennsylvania's main line, the interchange tracks, and appellee's industrial tracks within the plant. The Pennsylvania owns 14 miles of track which extends through the middle of the plant, and appellee owns 25 miles of industrial tracks which extend from the Pennsylvania's tracks to the several separate units or

departments of the plant (R. 209–210), each of which has its separate industrial track layout (Ex. C–154, R. 209–210).

The evidence shows that there are some 20 distinct points within the plant at which cars are loaded and unloaded (R. 210). The longest switch movement necessary in spotting the cars is 5200 feet, the shortest 400 feet, and the average 2300 feet, while from 4 to 5 miles of appellee's private track is used by the Pennsylvania in performing the spotting service (R. 210–211).

Appellee maintains 9 locomotives within the plant, 5 of which are large switching locomotives and 4 are small wheel engines, the former being used in intra-plant switching and the latter in handling materials between different buildings and units of the plant (R. 210–211). The Pennsylvania operates 3 locomotives in the plant: One is used 24 hours per day in interchange switching and spotting at the Steel Works, another is used 16 hours per day for spotting at the strip mills, and still another serves several units of appellee's plants a total of 7 or 8 hours but at different units and hours during the 24-hour day. This locomotive also serves plants of other nearby industries when not engaged at appellee's plant (R. 211).

The spotting service.—As stated, the Pennsylvania performs all spotting of cars in this plant. Cars destined to the Steel Works are switched by the Pennsylvania from its railroad yard and deliv-

ered upon two storage or interchange tracks where that switch movement ends. Appellee's locomotives later move the cars from the interchange tracks to its scales, weigh them in order to obtain the weight of inbound freight, and move them back and place them upon the interchange tracks. Then when the contents of the cars are required at the Steel Works, the Pennsylvania's locomotive moves the cars from the interchange tracks and spots them at the particular points in the Steel Works at which appellee desires to unload them. (R. 211, 214.) Thus there are two separate and distinct switch movements by the Pennsylvania of cars spotted at the Steel Works; and between the time of those separate movements, appellee itself handles the cars from the interchange tracks to the scales for the purpose of industrial weighing. This interruption by appellee of the Pennsylvania's spotting service is to enable the plant to dispense with the charge that would be made if the railroad did the weighing (R. 211). Cars destined to or from other units or departments of the plant than the Steel Works are not held upon interchange tracks but are spotted by the engine of the Pennsylvania which brings them into the plant (R. 212); but the Pennsylvania brings in from its yard only such cars as are called for by appellee. (R. 211–212.)

Weighing.—Appellee requires that all inbound freight be weighed except iron ore, coal or lime-

stone, which, however, are sometimes weighed to ascertain whether there has been a loss in transit (R. 211). All outbound cars containing finished products, except the plant and structural mill products, are weighed, the weighing in both instances being done on appellee's scales (R. 211). As stated above, the weighing of inbound cars to the Steel Works is done by appellee to avoid paying the railroad the weighing fee. This is accomplished by the plant handling the cars between the scales and interchange tracks, thus necessitating interruption of movement of the cars between the Pennsylvania yards and the "spots" in the plant, and resulting in two separate movements, now performed by different engines in switching the cars from the railroad yard to the final "spots" at the Steel Works. The Pennsylvania weighs cars which it spots at units other than the Steel Works and receives the tariff fee for such weighing (R. 211).

Plant requirements, convenience and interference.—The Pennsylvania spots the cars according to a "schedule" arranged by appellee to meet the requirements of the various departments of the plant. Its conductor is given a "pull slip" or written order by appellee directing the placement of the cars at the spots required by it (R. 211–212). At the Steel Works where the Pennsylvania maintains a locomotive "24 hours a day, 7 days a week", the operation is under the direction of ap-

pellee's yardmaster or foreman, who gives the engine foreman "a written work order telling him what cars must be moved to a certain department * * * and what time, of course." The Pennsylvania performs for plaintiff what is called a "stand-by service" (R. 212–213). In answer to the question whether it would be possible for the Pennsylvania engine to spot cars at the Steel Works upon any schedule convenient to it and without regard to appellee's requirements, Witness Earp answered (R. 212–213);

> * * * The engine assigned to the Steel Plant works under the supervision of the yardmaster or foreman of the Steel Plant, who gives the engine foreman a written work order telling him what cars must be moved to a certain department and when. The Pennsylvania engine is there to do what the industry wants done. This engine is assigned to stand-by service 24 hours a day, 7 days a week. This particular department could not be worked on schedule. An engine must be at hand all day long. In normal operation this engine does not have any idle time. There are 25 miles of track at this plant and in addition to this, 12 to 15 miles of track are on railroad property, which is shown in red.

A witness for the Pennsylvania testified that all the spotting service performed by it at this plant is performed under the direction of the plant, and that occasionally there might be some inter-

ference of the Pennsylvania's locomotives by the operation of appellee's plant locomotives (R. 240). He further testified that it would be impossible for the Pennsylvania to perform the service by going in any time it was especially convenient to them to arrive there and spot the cars without having some arrangement made with the industry; and that the program for spotting the cars was nothing more than an attempt to synchronize the two services within the plant. (R. 214.)

Thus the spotting service cannot be performed at this plant without "the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant", and, in order to perform the service the Pennsylvania is required "to subordinate the operation of the business of the carrier to the needs, the economies, the internal administration of the business of the shipper", *General Electric Case, supra*, p. 118. The services and the conditions under which they are performed are identical to those which the court held in that case to be "plant facilities" and which the carrier was not required to perform as part of the "reasonable delivery" called for by its line-haul rates.

Clearly the facts which we have set forth above, and the positive statements of the witnesses concerning the circumstances under which the work must necessarily be done, furnish ample support for the Commission's conclusion that the spotting of cars within this plant "is a plant service which

respondent is not obligated to perform and for which it is not compensated under its line-haul rates", and for the other conclusions stated it its supplemental report (R. 103). It must be remembered that appellee does not dispute the facts found by the Commission. Indeed, it could not be so because they were stated by its own traffic manager. Nor does appellee claim that evidence is lacking to prove the facts found. Its contention is that the Commission should have drawn other conclusions from the facts established by the evidence. Similar evidence was held sufficient to support the Commission's findings in *Los Angeles Switching Case, supra,* and *Warehouse Co.* v. *United States, supra.*

The lack of uniformity or of the asserted "custom" is again illustrated by the situation at this plant: For the first ten years the railroad performed the spotting service, but from 1919 to 1921 it did not perform the service at several of the departments of the plant nor did it pay an allowance for appellee's performance of the service. Since the latter date, the railroad has performed all the service, and appellee has declined to perform the service for an allowance of $1.23 per car. During this period the Pennsylvania refused definitely either to perform spotting service for the Allegheny Steel Company or to pay that company for performing the service, and recognized no such obligation with respect to that company until

1930. Further illustrations of the lack of a uniform custom is found in the four other cases before the court.

We submit that the evidence in this case, considered in the light of principles of the decisions cited in this portion of our brief, adequately supports the order.

WEST LEECHBURG STEEL CO. v. UNITED STATES

Appellee seeks in this case (R. 105) to enjoin the order of the Commission issued July 29, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of $1.28 per loaded car for spotting cars within its plant at Leechburg, Pa. (Report, R. 116; Order, R. 119.) Appellee is engaged in the manufacture of hot and cold rolled strip and skelp steel. In 1929, operating at 67% of plant capacity, it handled 11,000 cars into and out of the plant in spotting service.

Plant arrangement, equipment and power.—Appellee's traffic manager introduced in evidence as Ex. C–156 (Special Exhibits) a map or blueprint showing in detail the plant arrangement, number and location of buildings, industrial tracks, interchange tracks, and the main line of the railroad. Appellee's plant contains 17 industrial tracks aggregating about 4½ miles in length which serve 8 important points where cars are spotted for loading and unloading. The plant is bounded on the north by the Pennsylvania tracks and on the

south by the Kiskiminetas River, and is served by two interchange tracks, one for outbound and one for inbound cars. At these tracks the Pennsylvania delivers and receives cars in two shifts inbound and two shifts outbound each day, at the present time, while appellee is operating its plant on an 8-hour shift (Ex. C–156, R. 206). Appellee maintains one switching locomotive which it uses in interchange and other service continuously while the plant is operating. It also operates one locomotive crane which engages in intra-plant work only (R. 206).

Spotting service.—After the Pennsylvania has switched inbound or outbound cars from or to its main line and delivered them on the inbound or outbound interchange tracks, appellee's locomotives move them to or from the spots within the plants in the following manner (R. 206–207):

> When the plant power hooks on to the inbound cars at the interchange tracks, the cars are moved west on the inbound interchange track to a point near the 16-inch hot mill marked "scale", in red pencil, on the blue-print; farther down to the spur just east of the P. R. R. westbound to Kiski Junction, and then back in under the various unloading points at the 16-inch hot mill marked "Craneway", "Shipping Craneway", "12-inch hot mill Craneway", and the track leading back to the building marked "9-inch H. M." The outbound movement cars are taken from the four outbound load-

> ing platforms. The largest platform is located between the cold mill and the warehouse; the second platform at the warehouse; the third at the 16-inch hot mill; and the fourth at the 12-inch hot mill.

Weighing.—Appellee weighs all inbound cars for its own purposes only, but outbound cars are not weighed. The time consumed in weighing the cars is excluded from the estimated amount of expense incurred by appellee in the spotting service which is covered by the allowance paid it by the railroad.

History of the allowance.—The record does not show just when this plant first began operations, but apparently it always performed its own spotting service without an allowance until 1927. The circumstances leading to the publication and payment of the allowance are succinctly described by appellee's witness. (R. 206.)

The reasons for appellee's dissatisfaction with the spotting service performed by the Pennsylvania appear in the testimony of the same witness. He stated (R. 207) that the Pennsylvania sent a locomotive into the plant for an hour or two during the morning and again in the afternoon but that this was insufficient to "take care of all the interchange work"; and that (R. 207):

> Cars were left on the interchange tracks and the plant had to complete this work. Usually the Pennsylvania's locomotives only spent one hour in the morning and one in the afternoon at this plant. The carrier

> fixed a definite amount of time to devote to the interchange work. The railroad never did satisfactorily perform the spotting services at this point. While we have two shifts a day there are cars placed at different times a day by through trains; for instance, the cars that we receive from the Bethlehem Steel Company at Johnstown are usually placed at our plant by a Pennsylvania train somewhere around three or four o'clock in the afternoon, and quite often we could not wait until the following morning for the railroad to spot those cars for unloading, and it was necessary for us to get the cars, weigh them, and get them into the mill and unload them. During the period that the Pennsylvania handled this spotting service the cars were weighed in the same manner as they are now. The spotting by the Pennsylvania was unsatisfactory because cars were left on the interchange track by through trains after the afternoon shift. The plant could not wait for the morning shift to receive these because it was necessary to use the material immediately, so it was necessary for the industry to go out and get the cars itself.

The court will note that the witness stated (R. 207) that the reason appellee performed part of the spotting service during that time was that it received carloads of material which were required immediately in its manufacturing and that it could not wait for the regular spotting schedule of the Pennsylvania.

Plant requirements, convenience, and interruption.—As shown from the testimony already quoted, appellee receives materials used in its manufacturing processes which it must have spotted at various units of its plant for immediate use, thus necessitating "on call" interchange or spotting service 24 hours a day or whenever the plant is in operation. This evidence, therefore, clearly proves that the continuous spotting service is required solely to meet the needs of appellee's industrial operations and manufacturing processes, and that service satisfactory to appellee could not be performed by the Pennsylvania at its own convenience or upon any "set" schedule. The evidence with respect to weighing shows that the spotting service is not and could not be performed in connection with inbound cars in one uninterrupted movement because appellee requires that all inbound cars be moved from the interchange tracks to its scales for weighing and then spotted at unloading points.

This evidence is corroborated by testimony of an employee of the Pennsylvania. Witness Dixon explained why the Pennsylvania withdrew its power and arranged to pay the industry itself for performing the spotting service (R. 208).

From this testimony it is plain that the Commission properly concluded that the spotting service "has to be performed at the convenience of the industry", and that appellee's requirement for

weighing inbound cars prevents them from being spotted in "an uninterrupted movement" (R. 118). The testimony also clearly justifies the further conclusions stated in the Commission's report including the conclusion that the spotting of cars "are plant services" which it is not the duty of the railroad to perform, and that the interchange tracks constitute "a reasonably convenient point" for delivery and receipt of cars. (R. 118.) The evidence shows that excepting the three months during which the Pennsylvania attempted to perform the service, the interchange tracks have always been the point agreed upon between the railroad and appellee for delivery and receipt of cars. From this and the further fact that the cars could not be moved beyond the interchange tracks and spotted at the various units of the plant except when and as directed and required by appellee to meet its manufacturing processes, it seems a fair conclusion that placement of the cars upon the interchange tracks constituted the delivery to which appellee contends it is entitled, that is, "at reasonably convenient and accessible places" for loading and unloading. (R. 118.)

In this case, as in the other cases before the court, appellee makes no claim that the evidence is insufficient to prove the physical facts showing the plant arrangement, tracks, and the conditions under which the physical movement of the cars is performed. Nor does it deny that the evidence

proves that spotting service must be performed solely at its own convenience and direction, nor that the inbound cars can be spotted in an uninterrupted movement. It ignores all of these undisputed facts, and appears to base its claim on the assumption that the carrier is under the legal duty to perform the service, and upon the statement of witnesses that to perform the service would cost the railroad more than the amount of the allowance paid, and that, if the railroad must be required to perform the service or pay for it, it prefers to do the latter.

As in the other cases, the "custom" at this plant contradicts counsel's assertion of a "forty-year custom" of performing the spotting of cars as part of their line-haul duty.

The evidence clearly furnishes abundant support for the Commission's ultimate conclusion that performance of the service or payment of the allowance by appellee is in violation of the Act. Whether a carrier's line-haul tariffs require it to perform a particular service and whether such service is a transportation or a plant service are conclusions to be drawn by the Commission from facts showing "the actual conditions of operation", *Los Angeles Switching Case, supra;* and the credibility of witnesses and the weight to be given evidence are matters for the Commission and not for the courts, *Warehouse Co.* v. *United States, supra.*

Appellee seeks in this case (R. 120) to enjoin the Commission's order of September 12, 1935, which requires the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company to cease and desist from paying allowances of 75¢ and 65¢, respectively, per loaded and empty car, to appellee for performing plant spotting of cars in its plant at Crystal City, Mo., where it is engaged in the manufacture of plate glass. (Report, R. 129; Order, R. 132.)

Plant arrangement, equipment and power.—The arrangement of this plant, location of buildings, plant tracks, spur tracks and their connections with the Missouri Pacific and the Frisco, are shown in 4 charts or maps introduced by witnesses for the appellee and for the railroads (Exs. A–151, 152; 154, 155; Special Exhibits). (Or. R., Vol. 3, pp. 394–401.) A complete detailed description of the plant and the circumstances under which the spotting service is performed are set forth in the testimony of witnesses McMillen (R. 219) and Brown (R. 222). The facts so stated by those witnesses are accurately and succinctly summarized in the Commission's report, and, inasmuch as appellee does not deny that the evidence establishes the *facts* stated in the report or that the report correctly states the facts concerning the physical arrangement of the plant and tracks and the conditions

under which the service is performed, we quote those facts from the Commission's report (R. 130):

> The plant contains numerous buildings and about 27 railroad standard-gage tracks approximately 4 miles in length, which reach the numerous points of unloading and loading within the plant. The plant is served by the Missouri-Illinois Railroad Company, a subsidiary of the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company hereinafter generally termed the Missouri Pacific and the Frisco respectively.
>
> The main line of the Frisco from St. Louis, Mo., to Springfield, Mo., parallels the plant on the northeast side of the plant property and passes through a yard containing about 10 tracks located at the Crystal City station. One of the plant lead tracks parallels the Frisco main line and connects therewith at a point about 1,300 feet north of the Crystal City station. Another connection is made with the yard tracks about 500 or 600 feet northeast of the station with what is known as the Crystal City Railroad. This connection is seldom used, but to reach the plant through this connection it is necessary to cross the Frisco main line. Cars are delivered to the plant by the Frisco on any available track in the Crystal City yard. Outbound cars are placed on tracks in this yard designated by the agent at Crystal City. Cars consigned to the plant for the north are moved directly by the lead connections

> with the main line of the Frisco to Crystal City yard. The plant engines then move the cars in the reverse direction over the Frisco main track to point of connection with the plant lead track, thence over the lead track into the plant. The track layout in the plant is complicated and contains many sharp curves. The tracks encircle the plant and there are many spur tracks leading to the different loading or unloading points, at least one of which is elevated.

Weighing.—With respect to the weighing of the cars received at and shipped from the plant, the report states (R. 130):

> All cars, both loaded and empty, are weighed on a scale within the plant property. All cars, except those to be loaded or unloaded on the track on which the scale is located, after being weighed require a back-up movement to the point of switch with other tracks for placement for loading or unloading. Likewise there is required movement of the cars beyond the switch point leading to particular spurs, and a back-up movement from the switch point to the points of loading or unloading on such spur tracks.

Witness for the industry testified that weighing is done for the plant although it might also serve the convenience of the railroads (R. 225).

The spotting service.—The Commission's report contains the following summary of the facts disclosing the conditions under which the service is performed (R. 130):

The Frisco has never actually placed cars within the plant but, as far back as 1908, it entered into an agreement with the glass company under which cars are to be delivered to or received from the glass company on the tracks in Crystal City yard, above referred to. This agreement gave the glass company the right to operate its engine over the main line of the Frisco between the Crystal City yard and the point of connection with the plant tracks. Local trains of the Frisco operating through Crystal City usually arrive at that point late at night, and it would not be possible for the local to perform the necessary switching in the plant upon arrival, for the reason that the heavy locomotives could not operate over all the plant tracks in performing the necessary spotting service, because of curvature. Such spotting service could only be performed by the assignment of a switching locomotive at Crystal City. The switching engine could not be employed elsewhere in that vicinity, which means that it would be necessary to pay for an 8-hour trick to perform the service at the plant. At the time of the hearing it was stated it would take approximately two hours to perform such service, but in normal times the amount of traffic to be handled would be between 20 and 30 cars, and it was testified it would then take approximately five hours due to the complications within the plant because it is necessary to operate solely

between and into buildings and to protect the many employees working there.

The Commission summarized and stated the facts of record concerning the allowance paid to appellee by the Missouri Pacific as follows (R. 131):

> The Pittsburgh Plate Glass Company many years ago acquired the Crystal City Plate Glass Company, which prior thereto had built what is known as the Crystal City Railroad. A branch of this railroad extends from the Mississippi River to the plant of the glass company. It was constructed to bring to the glass company coal arriving via barge. In 1923 the Mississippi River & Bonne Terre Railroad made connections with the Crystal City Railroad and received from and delivered traffic to the industry at a point on the Crystal City Railroad about 1,000 feet from the point of connection. For the movement of cars between this point and the points of loading and unloading within the plant the glass company received an allowance of $2 per loaded car, which for competitive reasons was participated in by the Missouri Pacific. On January 1, 1929, the Mississippi River & Bonne Terre was leased by the Missouri-Illinois Railroad and about the same time the Missouri Pacific acquired control of the latter. On May 1, 1932, shortly before the hearing, the point of interchange with the plant was changed to two open tracks of the Crystal City Railroad located 6,000 feet nearer the

plant. The amount of the allowance was also changed at that time to 75 cents per car both loaded and empty. For the privilege of operating over the Crystal City Railroad to the present points of interchange the Missouri-Illinois maintains the tracks in a safe condition for the operation of its locomotives and furnishes the nonsalvageable material. The glass company furnishes the salvageable material. As in the case of the Frisco the engines operating the local trains of the Missouri-Illinois could not operate over the plant tracks because of excessive curvatures. Furthermore, if that carrier undertook to perform the switching it would be necessary to pass the point of connection with the Frisco northeast of the plant and cross the main line of that carrier in reaching the plant.

History of allowances.—The allowance paid by the Frisco was initiated in 1908, as shown by the contract in which it is provided (Ex. A–153), and it has always been 65¢ (R. 222).

The allowance of 75½ now paid by the Missouri Pacific was first made by the Mississippi River & Bonne Terre Railroad (now owned by the Missouri-Illinois Railroad which is a subsidiary of the Missouri Pacific), and the original allowance was $2 for each round trip of a car into and out of the plant (R. 230). Referring to the decision to pay the allowance, a witness for the Missouri Pacific said: "It was entirely a competitive arrangement

as we viewed it", and that the railroad sought the arrangement merely as a traffic inducement (R. 230). Appellee's traffic manager also stated that the allowance "was a traffic competitive proposition" (R. 231). The amount of this allowance was later reduced to 75¢ per loaded and empty car.

In connection with the allowance paid by the Frisco, the following statement from the Commission's report is important (R. 131):

> * * * The present tariff of the Frisco provides for an allowance to the industry, for performing the service in the manner indicated, of 65 cents per car for both loaded and empty. If an inbound car is made empty and the empty moved to another point in the plant for loading outbound, four allowances are paid. It is contended that the cost to the industry of moving the empty car, from the track in the plant where it is made empty, over the scale where it is weighed, thence to another track in the plant where it is to be loaded, involves as much service as the movement of the empty car from the plant to Crystal City yard and the bringing in of an empty from that yard to the point of loading.

Plant requirements, convenience and interference.—There are apparently some 10 spots at which cars are placed for unloading within the plant, and some of these are on elevated tracks (Ex. A–154, R. 222). Cars are spotted within the

plant for loading and unloading upon the industrial tracks "as the industry wants them". (R. 223.) Explaining his statement that it would take 5 hours to spot 20 cars within the plant, a witness for the Frisco said (R. 221):

> The reason why it would take 5 hours to switch 20 cars is on account of the physical layout. A switcher would have to go very slow around the buildings and there are a good many men working within the plant. It takes considerable time to switch that plant. As far as I know the industry would permit us to perform the switching. They have a gate at their plant and at times it is kept closed. To switch the industrial tracks would be much more complicated than that of the ordinary industrial or team track that I am familiar with.

He further said that the plant arrangement and tracks were such that both of the railroads could not spot cars within the plant at one time (R. 221); that the Frisco had no switch engine at Crystal City which could perform the service, and that if it undertook to perform it, it would be necessary to bring in an engine from elsewhere and assign it exclusively to that plant (R. 220–221). For the Missouri Pacific to reach the plant it must cross the Frisco tracks, but the switch movement could be made if the Frisco would consent to the crossing (R. 227).

In view of the fact that the cars must be spotted "as the industry wants them", rather than at the carriers' convenience, a curious situation results from the statements of witness Stanage, an employee of the Frisco, that the allowance is paid in recognition of that carrier's legal duty to make delivery under its line-haul rates, but that, nevertheless, it is his position that the service must be done at the carrier's convenience, and that, "we don't think it is our duty to go in there and spot a car every hour or two whenever the industry wants it" (R. 224). In other words, the Frisco denies any legal duty to spot cars in the plant, except at its own convenience, yet it pays for a service which, appellee's witnesses say, can be performed only at appellee's convenience.

"*Custom and Usage.*"—The lack of a uniform custom of the two railroads serving this plant is made clear by the testimony. The Frisco has paid the allowance since 1908, and has never performed the service. The contract (Ex. A–153) in which the allowance is provided, states no consideration for the allowance or any recognition by the Frisco of a legal duty to perform or pay for the service. It states: "the rate of compensation herein provided is fixed subject to adjustment at any time between the parties hereto if business conditions render a revision thereof necessary."

The "custom" of the Missouri Pacific and its subsidiary which initiated the allowance in 1923, is clear. Their witnesses frankly state that "it was entirely a competitive arrangement." (R. 230.) The Missouri Pacific neither performed the service nor paid any allowance for it until it saw fit to offer the allowance "merely as a traffic inducement" (R. 230). Thus, during a period of 15 years, one of the two carriers serving appellee's plant paid an allowance which it now claims that it pays in recognition of its legal duty, while the other carrier neither performed the service nor paid an allowance, and apparently recognized no such legal duty, for it frankly states that it paid the allowance as a traffic inducement. Moreover as already demonstrated, the Frisco is paying for a service which, in fact, is one that it denies it is required to perform under its line-haul rates.

The evidence clearly establishes that appellee's requirements for weighing prevent any possibility of the railroads performing the service in an uninterrupted movement, for the movement of each car must be interrupted at the scales for industrial weighing. It establishes that appellee's manufacturing requirements will not permit the spotting service to be done at the railroad's convenience but will permit cars to be spotted only "as the industry wants them". And it further shows that if both railroads undertook to perform their claimed legal

duty to spot the cars hauled by them to the interchange tracks, their engines would necessarily interfere with each other unless one railroad stood aside and waited until the other completed the spotting of its cars.

Such "cooperation in the division of labor and of functions" between a carrier and a shipper was held in the *General Electric Case, supra,* to constitute no part of the carrier's duty under its line-haul rates to make "reasonable delivery." The undisputed facts showing the arrangement of the plant, the industrial tracks, the spur tracks, and their connection with the main lines, and the "actual conditions of operation", are of the same nature which the court held sufficient to support similar findings by the Commission in the *Los Angeles Switching Case, supra,* and *Warehouse Co.* v. *United States, supra.* As in the other cases before the court, appellee does not deny that the evidence proves those facts. It does not really contend that the Commission drew conclusions without evidence, but merely that the Commission reached the wrong conclusion from evidence. It is the duty of the Commission to draw its own independent conclusions from facts rather than to accept and adopt the conclusions and opinions of witnesses. The evidence is clearly sufficient to justify the conclusions upon which the order rests.

CONCLUSION

The decision of the District Court should be reversed, the injunctions ordered dissolved, and the petitions dismissed.

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APPENDIX

Pertinent provisions of the Interstate Commerce Act are:

Section 1, subdivision 3, provides:

> (3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Section 6, subdivision 1 and 7, reads:

SEC. 6. [*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 6.*] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and

conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 12 (1) of the Act provides:

SEC. 12. [*As amended March 2, 1889, February 10, 1891, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 12.*] (1) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this part, and shall keep itself in-

formed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

The provisions of Section 13, subdivisions 1 and 2, are:

SEC. 13. [*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 13.*] (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be

done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of

this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 15, subdivisions 1, 13, and 14, read as follows:

SEC. 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.*] [*U. S. Code, title 49, sec 15.*] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commissions on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provi-

sions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which or-

der shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part.

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